TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 314

THE UNITED STATES, PLAINTIFF IN ERROR,

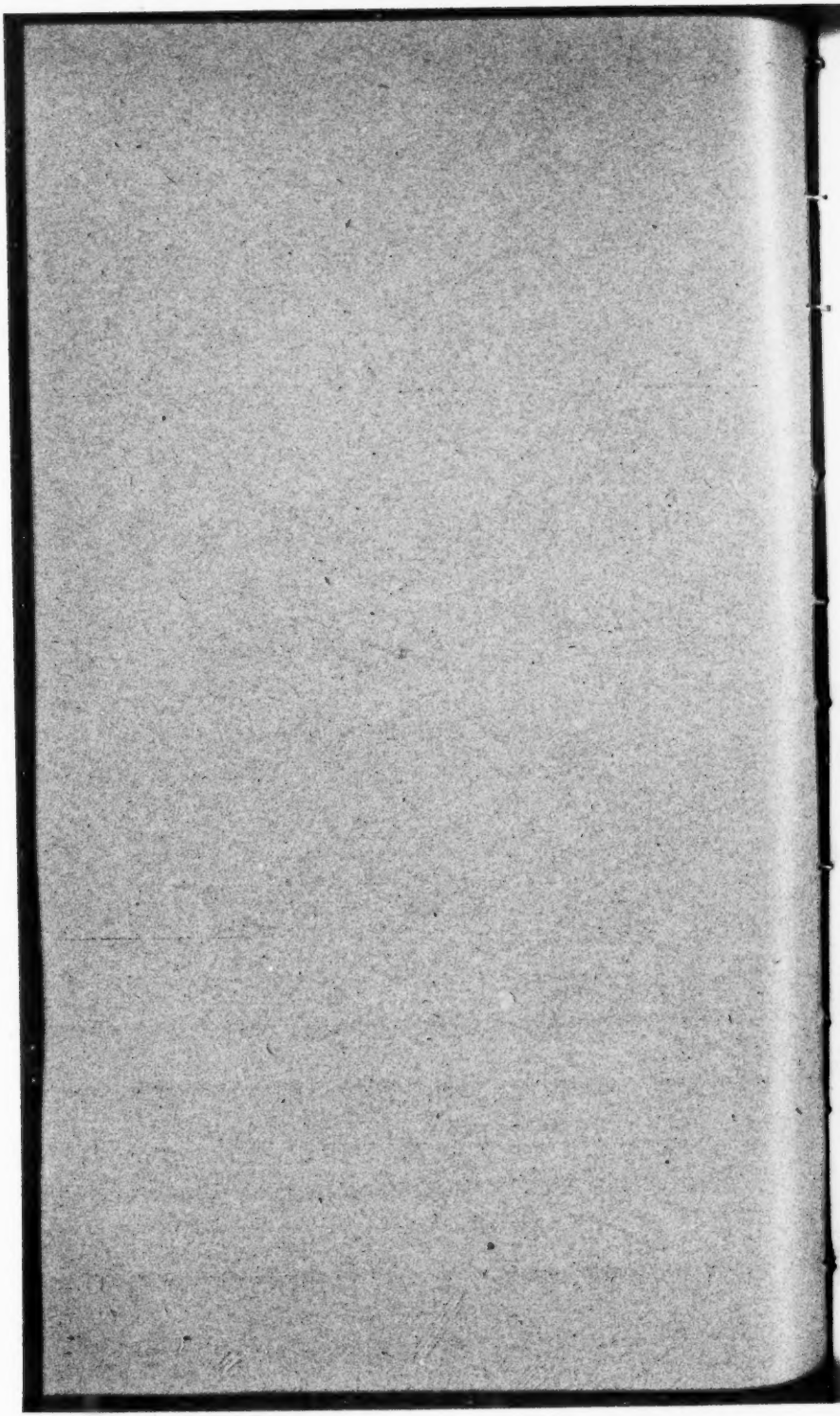
vs.

WILLIAM B. HAMMERS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED AUGUST 30, 1909.

(21807)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 581.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM B. HAMMERS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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a *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Olin Wellborn, judge of the District Court of the United States for the Southern District of California, greeting:

Because in the record and proceedings, as also in the giving, making, rendition, entering, and filing of the decision and judgment sustaining the demurrer of the defendant, William B. Hammers, to the indictment in that certain cause in the said District Court of the United States for the Southern District of California, Southern Division, before you, in which the United States of America is plaintiff and the said William B. Hammers is defendant, a manifest error hath happened, to the great damage of the said plaintiff, the United States of America, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and
b proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 2nd day of August, in the year of our Lord one thousand nine hundred and nine, and of the independence of the United States the one hundred and thirty-fourth.

[SEAL.] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States, in and for the Southern District of California, Ninth Circuit.

The above writ of error is hereby allowed.

OLIN WELLBORN, *District Judge.*

c I hereby certify that a copy of the within writ of error was on the 2nd day of August, 1909, lodged in the clerk's office of the said United States District Court for the Southern District of California, for the said defendant in error.

[SEAL.] E. H. OWEN,

Clerk of the United States District Court, Southern District of California.

d Service upon me of the within writ of error is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Indorsed:) No. 166 Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Writ of error. Filed Aug. 2, 1909. E. H. Owen, clerk.

e *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to William B. Hammers, defendant in error, and to Messrs. Valentine & Newby, his attorneys, greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein the United States of America is plaintiff, and you, the said William B. Hammers, are defendant in error, to show cause, if any there be, why the decision and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, this 2nd day of August, A. D. 1909, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] OLIN WELLBORN,
District Judge for the Southern District of California.

Attest:
E. H. OWEN,
Clerk, U. S. District Court,
Southern District of California.

f Service upon me of the within citation is hereby acknowledged by receiving a copy thereof, this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorneys for defendant Wm. B. Hammers.

(Indorsed:) No. 166 Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Citation. Filed Aug. 2, 1909. E. H. Owen, clerk.

g *Names and addresses of attorneys.*

For plaintiff in error: A. I. McCormick, United States attorney for the Southern District of California; Henry M. Willis, assistant United States attorney for the Southern District of California.

For defendant in error: L. H. Valentine, 445 Wilcox Building, Los Angeles, California; Nathan Newby, 445 Wilcox Building, Los Angeles, California.

h The answer of the judge of the District Court of the United States of America, in and for the Southern District of California.

The record and all proceedings of the indictment whereof mention is made, with all things touching the same, we certify under the seal of our said District Court to the United States Supreme Court, in a certain schedule to this writ annexed, as within we are commanded.

By the Court:

E. H. OWEN,
Clerk, U. S. District Court, Southern District of California.

1 In the District Court of the United States, in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFFS,
vs. No. 166. Crim.
WILLIAM B. HAMMERS, DEFENDANT.

2 In the District Court of the United States, in and for the Southern District of California, Southern Division.

At a stated term of said court, begun and holden at the city of Los Angeles, county of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday in January, in the year of our Lord one thousand nine hundred and nine, the grand jurors of the United States of America, chosen, selected, and sworn within and for the division and district aforesaid, on their oath present:

That William B. Hammers, whose full and true name, other than as herein stated, is to the said grand jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to wit, on the 30th day of January, 1908, at the town of El Centro, in the county of Imperial, State, division, and district aforesaid, and within the jurisdiction of this honorable court, did commit wilful and corrupt perjury, that is to say:

That heretofore, to wit, on the 14th day of August, 1907, one Granville M. Boyer, desiring to avail himself of the benefits of the public-land laws of the United States relating to desert lands and entries thereon, did, under and by virtue of said public-land laws of the United States, and, in particular, under and by virtue of the act of Congress approved March 3, 1877 (19 Statutes at Large, 1096),

make and file at and in the United States land office at said city of Los Angeles, county, State, division, and district aforesaid, his application and declaration under oath to enter, and was then and there allowed to and did then and there enter, under said acts of Congress, certain of the public lands of the United States
3 then situated at and within the county of San Diego, but now at and within the county of Imperial, in the Los Angeles, California, land district, State, division, and district aforesaid, and described as follows, to wit: A rectangular piece of land containing two hundred and forty (240) acres, in township 16 south, range 12 east, San Bernardino meridian, and being three-quarters (3/4) of a mile in length east and west and one-half mile in width north and south, the said described lands being then and there vacant, unappropriated, and surveyed public lands of the United States and open to entry, settlement, reclamation, and the obtaining of patent thereto under the said public-land laws of the United States relating to desert-land entries and said acts of Congress above mentioned, and he, the said Granville M. Boyer, being then and there and at all times in this indictment mentioned a citizen of the United States, and the said entry being numbered 3903 of the records of said land office of the United States; that thereafter, to wit on the 26th day of August, 1907, the said Granville M. Boyer did, by an instrument in writing in that behalf, duly executed by him, assign, transfer, and set over unto one Beulah Rose Beekler all interests acquired by him under and pursuant to and by virtue of said desert-land entry No. 3903, in and to said land, and did deliver his said assignment, in writing, of all his right, title, and interest in and to the said entry, being numbered 3903 as aforesaid, and in and to the said lands described and embraced in said entry, to said Beulah Rose Beekler, she, the said Beulah Rose Beekler, being then and there and at all times in this indictment mentioned a citizen of the United States, and she, the said Beulah Rose Beekler, did, on the said last mentioned date, duly file the said assignment with the register and receiver of the United States land office at the city of Los Angeles, county of Los Angeles, division and district aforesaid; that
4 under and by virtue of the said assignment of said desert-land entry No. 3903, as aforesaid, by the said Granville M. Boyer to the said Beulah Rose Beekler, she, the said Beulah Rose Beekler, did then and there acquire and succeed to all of the rights, title, interest, obligations, and duties in and respecting said entry and said lands which had been possessed by and had rested upon said Granville M. Boyer after the date of his said entry, to wit, August 14, 1907, and prior to the date of his said assignment, to wit, August 26, 1907, under the said public-land laws of the United States relating to desert-land entries; that thereafter, to wit, on the 30th day of January, 1908, and while said desert-land entry No. 3903 was pending before the register and receiver of the said United States land office at said city of Los Angeles, she, the said Beulah Rose Beekler, in pretended compliance with the said public-land laws of the United

States and the said acts of Congress and the rules and regulations of the General Land Office of the Department of the Interior of the United States in such case made and provided, did, according to the provisions of said public-land laws of the United States relating to desert-land entries, apply at the office of one Daniel S. Elder, clerk of the Superior Court of Imperial County, within the State and Southern Division of the Southern District of California, at the town of El Centro, to make her first yearly proof of improvement, irrigation, reclamation, and cultivation of said land, hereinbefore described and embraced in said desert-land entry No. 3903 and in said assignment, with the intent and for the purpose of thereafter procuring and obtaining from the United States patent to said lands; that the said Daniel S. Elder, as such clerk of said court, was then and there empowered and authorized by the said public-land laws of the United States relating to desert-land entries to receive the first yearly proof of improvement, irrigation, reclamation,
5 and cultivation of said described lands and to administer the oaths required by the said public-land laws of the United States relating to desert land entries to the witnesses presented by said Beulah Rose Beekler to testify and make affidavits in support of her said first yearly proof of improvement, irrigation, reclamation, and cultivation of said lands as aforesaid.

And the grand jurors aforesaid, on their oath aforesaid, do further present:

That the said William B. Hammers, whose full and true name is, as aforesaid, to the said grand jurors unknown, on the said 30th day of January, 1908, at the said town of El Centro, county, State, division, and district aforesaid, in pretended compliance with the terms and provisions of the acts of Congress hereinbefore referred to, and in pretended compliance with the rules and regulations of the General Land Office and of the Department of the Interior of the United States, in such case made and provided, did appear and was present at the said office of said clerk to testify and make affidavit as a witness for and on behalf of said applicant, Beulah Rose Beekler, assignee of the said Granville M. Boyer as aforesaid, and for the purpose of thereby enabling the said Beulah Rose Beekler to secure patent and title to said land from the United States, in the matter of the said desert land entry and in the making of her said first yearly proof of improvement, irrigation, reclamation, and cultivation of said land as aforesaid, and then and there, did, as such witness for and on behalf of said Beulah Rose Beekler, as aforesaid, and for the purposes aforesaid, subscribe certain written testimony which had on said date been given by him, the said William B. Hammers, before the said clerk of the said Superior Court of the said county of Imperial, State, division, and district aforesaid, to wit, before
6 the said Daniel S. Elder, who was then and there and at the time of the taking and giving of said testimony acting in his official capacity as such clerk of said Superior Court as aforesaid, and he, the said William B. Hammers, so having subscribed the

said testimony as aforesaid, did, then and there, to wit, on the said 30th day of January, 1908, wilfully, knowingly, unlawfully, corruptly, and feloniously, take an oath before said Daniel S. Elder as such clerk of said Superior Court of said county of Imperial as aforesaid, he, the said Daniel S. Elder, being then and there a public officer, to wit, the duly elected, qualified, and acting county clerk of Imperial County, State of California, and ex-officio clerk of the Superior Court of said Imperial County, the said Superior Court being then and there a court of record, and the said Daniel S. Elder, as such clerk, being then and there duly qualified and competent to administer said oath, under and pursuant to which said oath, he, the said William B. Hammers, did state and swear that said written testimony and each and every statement therein, so given and subscribed by him, the said William B. Hammers, as aforesaid, was true; that in giving said written testimony, which was so subscribed and sworn to by him, the said William B. Hammers, as aforesaid, and as a part thereof, he, the said William B. Hammers, did, knowingly, wilfully, unlawfully, and corruptly state and testify, for the purposes aforesaid, before the said clerk of said Superior Court of said county above named, amongst other things, certain material matter in substance and to the effect following, that is to say:

I am well acquainted with the land described and embraced in said desert land entry No. 3903, as aforesaid, made at the United States land office at Los Angeles, California, by the said Granville M. Boyer and assigned by said Granville M. Boyer to the said Beulah Rose Beekler (meaning and referring to the said land in township 16 south, range 12 east, San Bernardino meridian, containing two hundred and forty acres as above set forth). There was expended the sum of two hundred and fifty ($250.00) dollars—the said sum being not
7 less than one dollar per acre for each acre of said land embraced in said desert land entry No. 3903—in necessary irrigation, reclamation, and cultivation of the said land during the first year after the date of said entry (meaning after the date of said entry by Granville M. Boyer, to wit, August 14, 1907, and prior to the date of the taking of the said oath and giving and subscribing the said testimony by the said William B. Hammers before the said Daniel S. Elder, clerk of the Superior Court of Imperial County, to wit, January 30, 1908, as aforesaid). Said sum of two hundred and fifty ($250.00) dollars was expended in and for labor and bordering and leveling said land (meaning said land described and embraced in said desert land entry No. 3903, as aforesaid). Of the said sum of two hundred and fifty ($250.00) dollars so expended in necessary irrigation, reclamation, and cultivation of the said land (meaning said land embraced in desert land entry No. 3903) one hundred and eighty ($180.00) dollars thereof was expended during the interval of time indicated above, to wit, between August 14, 1907, and January 30, 1908, in the construction of twelve miles of borders on said land (meaning said land described and embraced in said desert land entry No. 3903, as aforesaid), at a cost of fifteen ($15.00) dollars per mile. The remainder of the said sum of two hundred and fifty ($250.00)

dollars, to wit, the sum of seventy ($70.00) dollars, so expended in the necessary irrigation, reclamation, and cultivation of said land, was expended during the said interval of time, to wit, between August 14, 1907, and January 30, 1908, in and for ten days' work with a four-horse team and a Fresno scraper at the rate of seven ($7.00) dollars per day in leveling the said land (meaning the said land embraced in said desert land entry No. 3903). My knowledge in regard to the existence of said improvements (meaning the said construction of the said twelve miles of borders on said land at the rate of fifteen
8 ($15.00) dollars per mile and the said ten days' work with a four-horse team and a Fresno scraper at the rate of seven ($7.00) dollars per day in leveling said land) was obtained from personal examination, and the values thereof (meaning the values of the said borders, to wit, fifteen ($15.00) dollars per mile or a total value of one hundred and eighty ($180.00) dollars, and the value of the said leveling of the said land, to wit, ten days' work with a four-horse team and a Fresno scraper at the rate of seven ($7.00) dollars per day or a total value of seventy ($70.00) dollars) are reasonably stated.

Which said statements and testimony so subscribed and sworn to by him, the said William B. Hammers, as aforesaid, that the sum of two hundred and fifty ($250.00) dollars was expended, during the interval of time aforesaid, in necessary improvement, irrigation, reclamation, and cultivation of said land, consisting of constructing twelve miles of borders at fifteen ($15.00) dollars per mile on said land, or a total expenditure of the sum of one hundred and eighty ($180.00) dollars for that purpose, and ten days' work with a four-horse team and Fresno scraper at seven ($7.00) dollars per day, or a total expenditure of the sum of seventy ($70.00) dollars, in leveling said land, were, and each of them was, then and there, material to the said first yearly proof of improvement, irrigation, reclamation, and cultivation of said land pursuant to said entry under the aforesaid acts of Congress in such case made and provided, and were material to the proof necessary to ultimately enable said Beulah Rose Beckler to obtain patent and title to said land from the United States, and were, and each of them was, then and there and at the time they were so made, given, subscribed, and sworn to by him, the said William B. Hammers, as aforesaid, and at all times, false and untrue, and known and believed by him, the said William B. Hammers,
9 to be false and untrue, and which said statements and testimony he, the said William B. Hammers, did not then and there believe to be true; the truth and the facts then and there being, as he, the said William B. Hammers, then and there and at the time of so making, giving, and subscribing said testimony and taking said oath thereto before said Daniel S. Elder, clerk of the Superior Court of Imperial County, California, as aforesaid, well knew, that the sum of two hundred and fifty ($250.00) dollars had not been expended during said interval of time, to wit, after August 14, 1907, and prior to the said 30th day of January, 1908, or at or during any other time, or at all, in necessary improvement, irrigation, reclamation, and cultivation of

said land, and that no other sum, or any sum whatsoever, in excess of the sum of twenty-five ($25.00) dollars, had then and there or at any time been expended in necessary improvement, irrigation, reclamation, and cultivation, or in the necessary improvement, or irrigation, or reclamation, or cultivation, of said land, embraced in said desert land entry No. 3903; that the sum of one hundred and eighty ($180.00) dollars had not been expended during said interval of time, to wit, after August 14, 1907, and prior to said 30th day of January, 1908, or at any other time, or at all, in the construction of twelve miles of borders upon said land, and that no other sum, or any sum whatsoever in excess of the sum of twenty-five ($25.00) dollars, had then and there, or at any time prior to the taking of said oath, been expended in the construction of borders upon said land; that the sum of seventy ($70.00) dollars had not, nor had any part thereof, or any other sum or any sum whatsoever, been expended during said interval of time, to wit, after August 14, 1907, and prior to the said 30th day of January, 1908, or at any time, or at all, in leveling the said land in and by employing ten days work with a four-horse team and a Fresno scraper thereon at the rate of seven ($7.00) dollars per day, or in any other manner, or by any other means, or at any other rate, or at all; all of which was then and there and at the time he, the said William B. Hammers, so subscribed said testimony and took said oath as aforesaid, well known to him, the said William B. Hammers;

That the only work or improvement done or made in the necessary irrigation, reclamation, or cultivation of the said land, described above, and embraced in said desert land entry No. 3903, during the said interval of time, from the date of said entry, to wit, August 14, 1907, to the date of the taking of said oath, to wit, the said January 30, 1908, consisted of four days' work of one man with a four-horse team and a plow in the pretended construction of about seven miles of alleged borders on said land; that the amount expended in and for the said work and improvement did not exceed the sum of twenty-five ($25.00) dollars, and the said improvem*tus*, to wit, the said alleged borders, were not of any value exceeding the value of twenty-five ($25.00) dollars;

That thereafter, to wit, on the fifteenth day of February, 1908, the said written testimony, so made, given, subscribed, and sworn to, for the purposes aforesaid, by said William B. Hammers, as such witness as aforesaid, at the time and place aforesaid, was duly filed with the said register and receiver of the said United States land office at said city of Los Angeles, as a part of said proceedings in relation to said desert land entry No. 3903, which were then and there pending before said register and receiver, as aforesaid.

Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

A. I. McCORMICK,
United States Attorney.

11 (Endorsed:) No. 166. Crim. United States District Court, Southern District of California. Southern Division. The United States of America vs. William B. Hammers. Indictment for violation section 5392, R. S. Perjury. A true bill. R. H. Howell, foreman. Presented and filed in open court, this 30th day of April, A. D. 1909. E. H. Owen, clerk.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: F. C. Prescott, G. C. Hunt, D. S. Elder, J. C. Thompson, J. A. Hoblit, Granville M. Boyer, M. P. Adams.

12 UNITED STATES OF AMERICA,
Southern District of California, ss.

To the marshal of the United States of America, for the Southern District of California, and his deputies, or any or either of them, greeting:

Whereas, at a District Court of the United States of America for the Southern District of California, begun and held at the [SEAL] city and county of Los Angeles, within and for the district aforesaid, on the 30th day of April, in the year of our Lord one thousand nine hundred and nine, the grand jurors in and for the said district, brought into the said court a true bill of indictment against William B. Hammers for violation section 5392 R. S., perjury, as by the same indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said William B. Hammers has not yet appeared or pleaded:

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said William B. Hammers and him bring before the said court, at the United States District Court room, in the city and county of Los Angeles, to answer the indictment aforesaid.

Witness, the Hon. Olin Wellborn, judge of the said District Court, and the seal thereof, at the city and county of Los Angeles, the 30th day of April, A. D. 1909.

Attest:

E. H. OWEN, *Clerk.*

A. I. McCORMICK,
U. S. Attorney.

MARSHAL'S OFFICE.
United States of America, Southern District of California.

In obedience to the warrant I have the body of the said William B. Hammers before the honorable the District Court of the
13 United States, in and for the Southern District of California, this 3rd day of May, A. D. 1909.

LEO V. YOUNGWORTH,
U. S. Marshal.

By B. H. FRANKLIN,
Deputy U. S. Marshal.

(Endorsed:) Marshal's Doc. No. 3282. No. 166, Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Wm. B. Hammers. Bench warrant. Bail fixed at $1,000. A. I. McCormick, U. S. attorney. Filed May 3d, 1909. E. H. Owen, clerk.

14 At a stated term, to wit, the January term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the seventh day of June, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable Olin Wellborn district judge.

THE UNITED STATES OF AMERICA, plaintiffs, *vs.* WM. B. HAMMERS, DEFENDANT.	No. 166. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

Henry M. Willis, esq., and Frank Stewart, esq., assistant U. S. attorneys, present as counsel for the United States; defendant present in court, with his attorney, L. H. Valentine, esq. This cause coming on this day for the arraignment of defendant and the entry of his plea, and defendant having been called and arraigned, having stated that his true name is William B. Hammers, and having waived the reading of the indictment, it is thereupon, good cause appearing therefor, ordered that said cause be, and the same hereby is, continued until Monday, the 14th day of June, A. D. 1909, at 10.30 o'clock a. m., for hearing upon a demurrer to the indictment, and for the entry of the plea of defendant.

15 In the District Court of the United States, Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs. Demurrer.
WILLIAM B. HAMMERS, DEFENDANT.

Comes now the above named defendant and demurs to the indictment in the above entitled cause, and for such demurrer alleges that said indictment does not state facts sufficient to constitute an offense against the United States of America.

VALENTINE & NEWBY,
Attorneys for Defendant.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the Southern District of California, So. Div. United States of America, plaintiff, vs. William B. Hammers, defendant. Demurrer. Filed June 7th, 1909. E. H. Owen, clerk.

Received copy of the within this 7 day of June, 1909. F. Stewart, asst. U. S. atty., attorneys for pltf.

Valentine & Newby, rooms 443, 445, and 447 Wilcox Building, Los Angeles, Cal., attorneys for defendant.

16 At a stated term, to wit, the January term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 14th day of June, in the year of our Lord one thousand nine hundred and nine.

Present: The honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, plaintiffs, *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

A. I. McCormick, esq., U. S. attorney, and Henry M. Willis, esq., assistant U. S. attorney, present as counsel for the United States; defendant present in court, with his attorney, L. H. Valentine, esq. This cause coming on this day to be heard on defendant's demurrer to the indictment herein; and said demurrer having been argued, in support thereof, by L. H. Valentine, esq., attorney as aforesaid for defendant, and said demurrer having also been argued, in opposition thereto, by Henry M. Willis, esq., assistant U. S. attorney, and by A. I. McCormick, esq., U. S. attorney, and said demurrer having been argued by Shirley C. Ward, esq., as amicus curiæ; it is thereupon ordered that said cause be, and the same hereby is, submitted to the court upon briefs to be served and filed as follows, to wit: On behalf of defendant within five (5) days, and on behalf of plaintiffs within five (5) days thereafter, and on behalf of defendant in reply within five (5) days thereafter.

17 At a stated term, to wit, the July term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 12th day of July, in the year of our Lord one thousand nine hundred and nine.

Present: The honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, plaintiffs, *vs.* WM. B. HAMMERS, DEFENDANT.	No. 16. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

This cause having heretofore been submitted to the court for its consideration and decision, on a demurrer to the indictment herein, and the court having duly considered the same, and being fully advised in the premises, now reads and files its conclusions, and it is ordered that said demurrer be, and the same hereby is, sustained;

to which ruling of the court plaintiffs, by A. I. McCormick, esq., U. S. attorney, ask that exceptions be noted on behalf of the United States, which request is granted and said exceptions hereby noted herein.

18 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES
vs.
WM. B. HAMMERS. } No. 166. Crim.

I, E. H. Owen, clerk of the District Court of the United States in and for the Southern District of California, do hereby certify that the foregoing papers, hereto annexed, constitute the judgment roll in the above-entitled cause.

Attest, my hand and the seal of said court, this 12th day of July, A. D. 1909.

[SEAL.] E. H. OWEN, *Clerk.*

(Endorsed:) No. 166. U. S. District Court, Southern District of California, Southern Division. The United States vs. Wm. B. Hammers. Judgment roll. Filed July 12, 1909. E. H. Owen, clerk.

19 In the District Court of the United States for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

Conclusions of the court on demurrer.

The indictment in this case charges perjury based on an affidavit of annual expenditures, made under the desert land laws.

This annual proof was taken on the application of a person to whom the entryman assigned within two weeks after filing his declaration.

Defendant contends that the law did not authorize the assignment, and, therefore, the affidavit was immaterial; so that the only question presented by the demurrer is whether or not a desert land entry may be assigned before the work of reclamation has been completed.

This question, so far as concerns the desert land act of 1877 (19 Sta. L., 107; 2 U. S. Comp. Stat., 1901, page 1548), has been expressly decided by the Supreme Court of the United States in a case where it was squarely presented, and, together with other legal questions, disposed of in the following language:

"This brings us to the final contention * * * that the desert land entry by Williams in 1879 gave to him no right which he could sell or transfer. * * * In the main we do not doubt these propositions of law." (Williams vs. United States, 138 U. S., 514, 522–523.)

The Government contends, however, that desert land entries are made assignable by the act of 1891, 26 Stat. L., 1096; 2 U. S. Comp. Stat., 1901, page 1549.

20 The words of the act on which the Government relies are "he or his assignors," in section 5, and "the applicant or his assigns" and "assignment," in section 7, these two sections being among those which the act of 1891 added to that of 1877. Said sections are respectively as follows:

"SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent

21 at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land."

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made

under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States."

Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government. (Miles vs. Croft, 13 Wallace, 80 U. S., 291; Defflebach vs. Hawk, 115
22 U. S., 393, 405; U. S. vs. Freyberg, 32 Fed., 195; Smith vs. Ewing, 23 Fed., 741, 744.) This qualified power of alienation has never, so far as I know, been denied by any court, and the sections above quoted do nothing more than import its recognition. They contain no apt words for the grant or creation of a new right, but their phraseology is appropriate as an incidental reference to a right already existing.

By this construction effect is given, as I shall show, to every word in the statute, and the whole is harmonious; whereas, to hold that an entry is assignable before the work of reclamation has been performed directly contravenes many of its substantial provisions.

The Government's contention, so far as it rests upon section 5, assumes, among other things, that the pronoun "he" in the clause "he or his assignors," refers only to an assignee. This assumption, although seemingly fair, if we restrict our view to the clause itself, is manifestly wrong when the clause is read, as it should be, in the light of its context. Suppose a case where there has been no assignment, but the entryman himself has fully completed the work of reclamation, and applied for a patent. "He" would necessarily mean the entryman, and could not refer to an assignee, because there is no assignee. So that the character of the person to whom "he" refers depends upon the circumstances of each case. If there has been no assignment, but the work of reclamation is accomplished by the entryman who applies for the patent, then, as I have just shown, "he" can not refer to an assignee. If, however, the entryman, after completing the work of reclamation, assigns his entry, then the word "he" must refer to an assignee.

This view becomes unassailable when the section is fully analyzed. The first clause provides: "That no land shall be patented to any person under this act unless he or his assignors shall have
23 expended * * * at least three dollars per acre of the whole tract reclaimed and patented in the manner following," etc. The statute then proceeds to specify, with uncommon clearness, the person by whom, and the periods within which the expenditures shall be made, as follows: "Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid, and he," that is, the party so entering, "shall expend one dollar per acre during the second year and also during the third year thereafter, and that

said party," that is, the party so entering, "shall file during each year with the register proof by affidavits that the full sum of one dollar per acre has been expended in such necessary improvements during such year." The section further provides that if any party who has made such application shall fail to file the testimony aforesaid, the land shall revert to the United States, etc.

Thus, it will be seen that all of the requirements of the section as to expenditures are laid expressly upon the entryman, and that they are, of course, utterly incompatible with a right to assign before the requirements are fulfilled. From this conclusion there is no escape.

If Congress had intended to confer the right of assignment during the progress of the work of reclamation it would have inserted after each reference to the "entryman," in some appropriate way, the words "or his assigns." Nor can it be said that the failure to make these insertions was inadvertent, because the use of the words "or his assignors," in the second line of the section, shows unmistakably that Congress had that matter specifically in mind.

The views above expressed fully indicate the meaning of the words "the applicant or his assigns" in section 7 of said act:
24 that is to say, if the entryman himself has performed the work of reclamation and applies for the patent, then the patent will issue to him, or if, after completing the work of reclamation, he transfers his equitable estate, then the patent will issue to his assigns.

Moreover, there is to be found in section 7 strong confirmation of the construction which I have placed upon section 5, and it is as follows:

"That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land, and to the extent and cost, and in the manner aforesaid and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns."

The reclamation and cultivation, it will be seen, must be accomplished "in the manner aforesaid," that is, by the entryman himself, and in such event the patent may issue to him or his assigns.

The construction above indicated of the act of 1891 was subsequently adopted by Congress in "An act for the relief of persons who have filed declarations of intention to enter desert lands," etc., which is in part as follows (underscoring mine):

"That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof
25 may be made in each case is hereby extended to five years from the date of filing the declaration; and the requirement that

the persons filing such declarations shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with: Provided, that within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and *in the manner provided by existing law*, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as herein provided." (28 U. S. Stat. L., 226; 3 Comp. Stat., 1901, p. 1552.)

The foregoing analysis of sections 5 and 7 of the act of 1891, shows to my mind, almost with the certainty of a mathematical demonstration, that Congress, in passing the act of 1891, never intended or contemplated the absolute and unqualified assignability of desert land entries, and this view finds strong confirmation in the subsequent construction which Congress itself placed upon said act by the act of 1894, from which I have just quoted.

The conclusion above announced has received implied sanction from the Circuit Court of Appeals of the 8th Circuit, where it was said, referring to the desert-land act of 1877:

"There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title when perfected for the benefit even of a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation." (United States vs. McIntosh, 85 Fed., 333, 338.)

26 No decision by any court, giving a different construction to the act of 1891, has been called to my attention. Several cases construing other acts have been cited, among them Webster vs. Luther, 163, U. S., 331; Williamson vs. United States, 207 U. S., 425; Adams vs. Church, 193 U. S., 510; and United States vs. Biggs, 211 U. S., 507; and Rose v. Wood & Lumber Co., 73 Cal., 385; but they are but little, if at all, aidful in the present enquiry, because the statutory provisions with which they deal are different from those now before the court.

Arnold vs. Christy, 33 Pac. Rep., 619, 620, does not determine that a land entry is assignable, for the instrument there before the court was an executory agreement to convey after patent, as shown by the following extract from the body of the opinion:

"We know of no ruling of the Land Department holding that one who has entered desert lands in good faith may not make an agreement to convey the land after title shall vest in him. On the contrary, the Land Department has affirmatively recognized such agreement as valid, and as not affecting the rights of the entryman to obtain title. In the case of Lanktree vs. Vibrans, decided by Commissioner Sparks, and reported in 13 Copp, Landowner, 220, of January 1, 1887, it was held that such an agreement was not an assign-

ment of the entry, and not prohibited by any ruling of the department."

Phillips vs. Carter, 135 Cal., 601, does construe the desert-land laws. That case, however, so far from holding that an entry is assignable before reclamation, may be fairly invoked as an authority on the other side. The second paragraph of the syllabus is as follows:

"A right of entry under the desert-land act of 1877 in favor of one who had reclaimed the lans was assignable," etc.

In the body of the opinion is the following:

27 "The right of alienation or assignment, therefore, in the absence of imposed restrictions, vests in the entryman, and, as has been said, there is nothing in the law imposing such restriction, while, on the other hand, equitable considerations impel strongly to the view that such rights should be assignable. The case at bar is illustrative of this. Foster had filed his declaratory statement, paid twenty per cent of the purchase price, reclaimed the land by irrigation as required by law. He was not permitted to make his final payment and proof, because the right to do so had been peremptorily suspended by order of the Land Department. Foster, then, having done all that the law requires and being unable to obtain his patent, dies. To hold that his right, perfected in so far as he could perfect it, was not alienable and did not descend, would mean that the policy of the Government was to deprive his heirs of the fruits of his labor and expenditures, and leave the land, with all its improvements, open to the first comer who might obtain possession of it."

But it is said that the Interior Department has uniformly placed upon the act of 1891 a construction different from that above announced, and Mr. Trippet, of counsel for the defendants in criminal cases numbers 59, 60, and 61, Southern Division, in a note to the brief filed by him in said cases, has cited five decisions of the Interior Department showing its construction of the desert-land laws to be as above indicated, said decisions, the earliest of which was rendered December 22nd, 1895, and the last June the 16th, 1900, being as follows: Fred W. Kimble, 20 L. D., 67, 70, 71; Nevada So. Ry. Co., 22 L. D., 1 and 3; Thomas W. Jeremy (on review), 25 L. D., 375; Casquet et al. vs. Butler's Heirs et al., 27 L. D., 721; and Ellingson vs. Aitken, 30 L. D., 71, 73, and 74.

28 I have read these decisions carefully, and find that they do not attempt a full, or even partial, consideration of the various provisions of the desert-land acts bearing upon the question of assignability. In most if not all of said cases the right to assign seems to be assumed rather than deduced from careful or analytical examination of said acts. Whatever may be said of them, however, as arguments, they would, because of the high source from which they emanate and the probability that persons who have been interested in the acquisition of desert lands may have relied upon them as correct expositions of the law, be entitled, in the contingency below mentioned, to great weight. On this subject the rule has been often authoritatively an-

nounced that where a court is doubtful about the meaning of an act of Congress the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive, if not absolutely controlling. (United States vs. Union Pacific Co., 148 U. S., 562, 572; United States vs. Tanner, 147 U. S., 661, 663; United States vs. Graham, 110 U. S., 217, 221.) There are many other decisions to the same effect, some of which are referred to in the brief of Mr. Trippet as amicus curiæ, filed herein June 28th, 1909, but as the three cases which I have named state the rule as favorably to the Government as it is stated in any of the other cases, it is needless to multiply citations here. Under this rule, however, it must be noted that the practice of the department is not of itself sufficient to raise a doubt, for since, in cases of doubt, such practice is virtually controlling; to hold that it can also raise the doubt is to declare that an executive construction of a statute is binding upon the courts. This, of course, is not the law, but, on the contrary, the court must examine for itself the statute, and if, upon such examination, it seems ambiguous, then the practice of the department is entitled to the
29 weight above indicated; if, however, the words of the statute seem unequivocal, the court is bound to follow its own judgment as to their meaning, whatever may have been the rulings or practice of the department.

It has been said, during the progress of the argument in this and kindred cases, that under the rules and regulations adopted by the General Land Office, a large number of reclamations have been effected in Imperial Valley by assignees, who are now awaiting patents for the lands so reclaimed. This argument, if there were any doubts in my mind, would resolve them in favor of the Government's contention, but after a thorough and searching examination of the acts of 1877 and 1891, I am fully convinced that entries under said acts are not assignable before reclamation, and, under these circumstances, for me to hold otherwise would be to disregard my own convictions where duty enjoins their observance.

For some citations applicable here, see my conclusions filed November 6th, 1908, in the United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division, and also my conclusions this day filed in the cases entitled United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division, United States vs. Paul H. McPherrin et al., No. 60, Crim., Southern Division, and United States vs. Frank Chaplin et al., No. 61, Crim., Southern Division.

The demurrer to the indictment is sustained.

OLIN WELLBORN, *Judge*.

(Endorsed:) No. 166. Crim. U. S. District Court, Southern District of California, Southern Division. The United States vs. Wm. B. Hammers. Conclusions of the court on demurrer. Filed Jul. 12, 1909. E. H. Owen, clerk.

30 In the District Court of the United States, in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

Bill of exceptions.

Be it remembered that in this case the indictment was duly returned, presented, and filed in open court on the 30th day of April, 1909; that the defendant, William B. Hammers, was on the 7th day of June, 1909, duly and regularly arraigned on said indictment; and that, all due and regular proceedings being had, the said defendant, by his attorneys, Messrs. Valentine & Newby, did thereafter, to wit, on said 7th day of June, 1909, present and file his demurrer to the indictment in said cause, which said demurrer was and is in the words and figures following, to wit:

"In the District Court of the United States, Southern District of California, Southern Division.

"THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } Demurrer.

"Comes now the above-named defendant and demurs to the indictment in the above-entitled cause, and for such demurrer alleges that said indictment does not state facts sufficient to constitute an offense against the United States of America.

"(Signed) VALENTINE & NEWBY,
"*Attorneys for Defendant.*"

That all due and regular proceedings being had, the said demurrer was thereafter, to wit, on the 14th day of June, 1909, in open
31 court, argued by the respective parties to the said cause before said court, and upon the completion of said argument the matter was duly and regularly submitted to the said court for its decision and judgment; that after duly and regularly considering the same the said court did, to wit, on the 12th day of July, 1909, duly and regularly render, give, make, and enter its final decision and judgment in said cause, in and by which said decision and judgment the said court did sustain said demurrer, all for the reasons and upon the grounds, and those only, which are set forth in the certain written opinion then filed by the court in this cause, which opinion is in the words and figures following:

"In the District Court of the United States for the Southern District of California, Southern Division.

"THE UNITED STATES OF AMERICA, PLAINTIFFS. *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim.

"*Conclusions of the court on demurrer.*

"The indictment in this case charges perjury based on an affidavit of annual expenditures made under the desert land laws.

"This annual proof was taken on the application of a person to whom the entryman assigned within two weeks after filing his declaration.

"Defendant contends that the law did not authorize the assignment, and therefore the affidavit was immaterial; so that the only question presented by the demurrer is whether or not a desert land entry may be assigned before the work of reclamation has been completed.

"This question, so far as concerns the desert land act of 1877 (19 Sta. L., 107, 2 U. S. Comp. Stat., 1901, page 1548), has been expressly decided by the Supreme Court of the United States, in a case
32 where it was squarely presented, and, together with other legal questions, disposed of in the following language:

"'This brings us to the final contention * * * that the desert land entry by Williams in 1879 gave him no right which he could sell or transfer. * * * In the main we do not doubt these propositions of law.' (Williams vs. United States, 138 U. S., 514, 522–523.)

"The Government contends, however, that desert land entries are made assignable by the act of 1891, 26 Stat. L., 1096; 2 U. S. Comp. Stat., 1901, page 1549.

"The words of the act on which the Government relies are 'he or his assignors,' in section 5, and 'the applicant or his assigns' and 'assignment' in section 7, these two sections being among those which the act of 1891 added to that of 1877. Said sections are respectively as follows:

"'SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purpose aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per

acre has been expended in such necessary improvements during
33 such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land.'

"'SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent more than three hundred and twenty acres of such arid or desert lands: but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of
34 law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States.'

"Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government. (Miles vs. Croft, 13 Wallace, 80 U. S., 291; Defflebach vs. Hawk, 115 U. S., 393, 405; U. S. vs. Freyberg, 32 Fed., 195; Smith vs. Ewing, 23 Fed., 741, 744.) This qualified power of alienation has never, so far as I know, been denied by any court, and the sections above quoted do nothing more than import its recognition. They contain no apt words for the grant or creation of a new right, but their phraseology is appropriate as an incidental reference to a right already existing.

"By this construction effect is given, as I shall show, to every word in the statute, and the whole is harmonious; whereas, to hold that an entry is assignable before the work of reclamation has been performed directly contravenes many of its substantial provisions.

"The government's contention, so far as it rests upon section 5, assumes, among other things, that the pronoun 'he' in the clause 'he or his assignors,' refers only to an assignee. This assumption, although seemingly fair, if we restrict our view to the clause itself, is manifestly wrong when the clause is read, as it should be, in the light of its context. Suppose a case where there has been no assignment, but the entryman himself has fully completed the work of reclamation, and applied for a patent. 'He' would necessarily mean the entryman, and could not refer to an assignee, because there is no assignee. So that the character of the person to whom 'he' refers depends upon the circumstances of each case. If there
35 has been no assignment, but the work of reclamation is accomplished by the entryman who applies for the patent, then, as I have just shown, 'he' can not refer to an assignee. If, however, the entryman, after completing the work of reclamation, assigns his entry, then the word 'he' must refer to an assignee.

"This view becomes unassailable when the section is fully analyzed. The first clause provides: 'That no land shall be patented to any person under this act unless he or his assignors shall have expended * * * at least three dollars per acre of the whole tract reclaimed and patented in the manner following,' etc. The statute then proceeds to specify, with uncommon clearness, the person by whom and the periods within which the expenditures shall be made, as follows: 'Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid, and he,' that is, the party so entering, 'shall expend one dollar per acre during the second year and also during the third year thereafter, and that said party,' that is, the party so entering, 'shall file during each year with the register proof by affidavits that the full sum of one dollar per acre has been expended in such necessary improvements during such year.' The section further provides that if any party who has made such application shall fail to file the testimony aforesaid the land shall revert to the United States, etc.

"Thus, it will be seen that all of the requirements of the section as to expenditures are laid expressly upon the entryman, and that they are, of course, utterly incompatible with a right to assign before the requirements are fulfilled. From this conclusion there is no escape.

"If Congress had intended to confer the right of assignment during the progress of the work of reclamation it would have
36 inserted after each reference to the 'entryman,' in some appropriate way, the words 'or his assigns.' Nor can it be said that the failure to make these insertions was inadvertent, because the use of the words 'or his assignors,' in the second line of the section, shows unmistakably that Congress had that matter specifically in mind.

"The views above expressed fully indicate the meaning of the words 'the applicant or his assigns' in section 7 of said act; that is

to say, if the entryman himself has performed the work of reclamation and applies for the patent, then the patent will issue to him, or if, after completing the work of reclamation, he transfers his equitable estate, then the patent will issue to his assigns.

"Moreover, there is to be found in section 7 strong confirmation of the construction which I have placed upon section 5, and it is as follows:

"'That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land and to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns.'

"The reclamation and cultivation, it will be seen, must be accomplished 'in the manner aforesaid,' that is, by the entryman himself, and in such event the patent may issue to him or his assigns.

"The construction above indicated of the act of 1891 was subsequently adopted by Congress in 'An act for the relief of persons who have filed declarations of intention to enter desert lands,' etc., which is in part as follows (underscoring mine):

"'That in all cases where declarations of intention to enter desert lands have been filed, and the four years' limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which such proof may be made in each such case is hereby extended to five years from the date of filing the declaration; and the requirements that the *persons filing such declarations* shall expend the full sum of one dollar per acre during each year toward the reclamation of the land is hereby suspended for the year eighteen hundred and ninety-four, and such annual expenditure for that year, and the proof thereof, is hereby dispensed with; Provided, That within the period of five years from filing the declaration satisfactory proof be made to the register and receiver of the reclamation and cultivation of such land to the extent and cost and *in the manner provided by existing law*, except as to said year eighteen hundred and ninety-four, and upon the payment to the receiver of the additional sum of one dollar per acre, as provided in existing law, a patent shall issue as herein provided.' (28 U. S. Sta. L., 226; 3 Comp. Stat., 1901, page 1552.)

"The foregoing analysis of sections 5 and 7 of the act of 1891 shows, to my mind, almost with the certainty of a mathematical demonstration, that Congress in passing the act of 1891 never intended or contemplated the absolute or unqualified assignability of desert-land entries, and this view finds strong confirmation in the subsequent construction which Congress itself placed upon said act by the act of 1894, from which I have just quoted.

"The conclusion above announced has received implied sanction from the Circuit Court of Appeals of the 8th Circuit, where it was said, referring to the desert-land act of 1877:

"'There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title when per-
38 fected for the benefit even of a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation.' (United States vs. McIntosh, 85 Fed., 333, 338.)

"No decision by any court, giving a different construction to the act of 1891, has been called to my attention. Several cases construing other acts have been cited, among them Webster vs. Luther, 163 U. S., 331; Williamson vs. United States, 207 U. S., 425; Adams vs. Church, 193 U. S., 510; and United States vs. Biggs, 211 U. S., 507; and Rose v. Wood & Lumber Co., 73 Cal., 385, but they are but little, if at all, aidful in the present enquiry, because the statutory provisions with which they deal are different from those now before the court.

"Arnold vs. Christy, 33 Pac. Rep., 619, 620, does not determine that a land entry is assignable, for the instrument there before the court was an executory agreement to convey after patent, as shown by the following extract from the body of the opinion:

"'We know of no ruling of the land department holding that one who has entered desert lands in good faith may not make an agreement to convey the land after title shall vest in him. On the contrary, the land department has affirmatively recognized such agreement as valid and as not affecting the rights of the entryman to obtain title. In the case of Lanktree vs. Vibrans, decided by Commissioner Sparks, and reported in 13 Copp, Landowner, 220, of January 1, 1887, it was held that such an agreement was not an assignment of the entry, and not prohibited by any ruling of the department.'

"Phillips vs. Carter, 135 Cal., 604, does construe the desert-land laws. That case, however, so far from holding that an entry is assignable before reclamation, may be fairly invoked as an authority on the other side. The second paragraph of the syllabus
39 is as follows:

"'A right of entry under the desert-land act of 1877 in favor of one who had reclaimed the land was assignable, etc.

"In the body of the opinion is the following:

"'The right of alienation or assignment, therefore, in the absence of imposed restrictions, vests in the entryman, and, as has been said, there is nothing in the law imposing such restriction, while, on the other hand, equitable considerations impel strongly to the view that such rights should be assignable. The case at bar is illustrative of this. Foster had filed his declaratory statement, paid twenty per cent of the purchase price, reclaimed the land by irrigation, as required by law. He was not permitted to make his final payment and proof because the right to do so had been peremptorily suspended by order of the Land Department. Foster, then, having done all that the law

requires and being unable to obtain his patent, dies. To hold that his right, perfected in so far as he could perfect it, was not alienable and did not descend would mean that the policy of the Government was to deprive his heirs of the fruits of his labor and expenditures, and leave the land, with all its improvements, open to the first comer who might obtain possession of it."

"But it is said that the Interior Department has uniformly placed upon the act of 1891 a construction different from that above announced, and Mr. Trippet, of counsel for the defendants in criminal cases numbers 59, 60, and 61, Southern Division, in a note to the brief filed by him in said cases, has cited five decisions of the Interior Department showing its construction of the desert-land laws to be as above indicated, said decisions, the earliest of which was rendered December the 22nd, 1895, and the last June the 16th, 1900, being
40 as follows: Fred W. Kimble, 20 L. D., 67, 70, 71; Nevada So. Ry. Co., 22 L. D., 1 and 3; Thomas W. Jeremy (on review), 25 L. D., 375; Gasquet et al. vs. Butler's Heirs et al., 27 L. D., 721; and Ellington vs. Atken, 30 L. D., 71, 73, and 74.

"I have read these decisions carefully, and find that they do not attempt a full or even partial consideration of the various provisions of the desert-land acts bearing upon the question of assignability. In most, if not all of said cases, the right to assign seems to be assumed rather than deduced from careful or analytical examination of said acts. Whatever may be said of them, however, as arguments they would, because of the high source from which they emanate and the probability that persons who have been interested in the acquisition of desert lands may have relied upon them as correct exposition of the law, be entitled, in the contingency below mentioned, to great weight. On this subject the rule has been often authoritatively announced that where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive, if not absolutely controlling. (United States vs. Union Pacific Co., 148 U. S., 562, 572; United States vs. Tanner, 147 U. S., 661, 663; United States vs. Graham, 110 U. S., 217, 221.) There are many other decisions to the same effect, some of which are referred to in the brief of Mr. Trippet as amicus curiæ, filed herein June the 28th, 1909, but as the three cases which I have named state the rule as favorable to the Government as it is stated in any of the other cases, it is needless to multiply citations here. Under the rule, however, it must be noted that the practice of the department is not of itself sufficient to raise a doubt, for since, in cases of doubt, such practice is virtually controlling, to hold that it can also raise the doubt is to declare that an
41 executive construction of a statute is binding upon the courts. This, of course, is not the law, but, on the contrary, the court must examine for itself the statute, and if upon such examination, it seems ambiguous, then the practice of the department is entitled to the weight above indicated; if, however, the words of the statute seem unequivocal, the court is bound to follow its own judgment as to their

meaning, whatever may have been the ruling or practice of the department.

"It has been said, during the progress of the argument in this and kindred cases, that under the rules and regulations adopted by the General Land Office a large number of reclamations have been effected in Imperial Valley by assignees, who are now awaiting patents for the lands so reclaimed. This argument, if there were any doubts in my mind, would resolve them in favor of the government's contention, but, after a thorough and searching examination of the acts of 1877 and 1891, I am fully convinced that entries under said acts are not assignable before reclamation, and, under these circumstances, for me to hold otherwise would be to disregard my own convictions where duty enjoins their observance.

"For some citations applicable here, see my conclusions filed November 6th, 1908, in United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division; and also my conclusions this day filed in the cases entitled United States vs. Herbert C. Oakley et al., No. 59, Crim., Southern Division; United States vs. Paul H. McPherrin et al., No. 60, Crim., Southern Division; and United States vs. Frank Chaplin et al.

"The demurrer to the indictment is sustained.

"(Signed) OLIN WELLBORN, *Judge*."

To which said decision and judgment of the court, so, for the reasons and upon the grounds aforesaid, sustaining the said demurrer to the said indictment, and to the whole thereof, the United
42 States of America, plaintiff in said cause, by its counsel, then and there duly excepted, which said exception was then and there duly and regularly entered in the minutes of said court.

And, forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this, its bill of exceptions, and prays that the same may be signed and allowed and duly authenticated and made a part of the record herein, which is accordingly done this 2nd day of August, 1909.

OLIN WELLBORN,
District Judge.

Service of the foregoing proposed bill of exceptions is hereby admitted this 2nd day of August, 1909, and it is hereby stipulated that the same is correct and may be settled, approved, and allowed as the bill of exceptions to be used upon writ of error from the Supreme Court of the United States in the above-entitled cause.

VALENTINE & NEWBY,
Attorneys for Defendant, William B. Hammers.

(Endorsed:) Original. No. 166. Crim. In the District Court of the United States for the Southern District of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Bill of exceptions. Filed Aug. 2, 1909. E. H. Owen, clerk.

43 At a stated term, to wit, the July term, A. D. 1909, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the court room thereof, in the city of Los Angeles, on Monday, the 2nd day of August, in the year of our Lord one thousand nine hundred and nine:

Present: The Honorable Olin Wellborn, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS, *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim. S. D. Indictment for violation of sec. 5392, R. S. Perjury.

Henry M. Willis, esq., and Frank Stewart, esq., assistant U. S. attorneys, present as counsel for the United States. Now comes Henry M. Willis, assistant U. S. attorney, and presents a petition for writ of error and an assignment of errors, which are filed in open court; thereupon there is also filed a writ of error to the Supreme Court of the United States herein, issued out of the Circuit Court of the United States for the Southern District of California, Southern Division, and a citation thereon is issued and filed in open court, and also a certificate of the court on writ of error, and a bill of exceptions, which is settled, signed, and filed.

44 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS, *vs.* WILLIAM B. HAMMERS, DEFENDANT.	No. 166. Crim.

Petition for writ of error.

The United States of America, plaintiff in the above-entitled action, feeling itself aggrieved by the decision and judgment of the above-entitled court, rendered, given, made, and entered on the 12th day of July, 1909, sustaining the demurrer of the above-named defendant to the indictment in this action, comes now and petitions said court for an order allowing said plaintiff, the United States of America, to prosecute a writ of error to the honorable the Supreme Court of the United States, from said decision and judgment, and the whole thereof, under and according to the laws of the United States, and especially under and by virtue of the provisions of the act of Congress of March 2, 1907, chapter 2564, 34 Sta. at L., 1246, in that behalf made and provided, and said the United States of America prays that said petition for said writ of error may be allowed, and that a proper transcript of the record, proceedings, and papers upon which said decision and judgment was rendered, given,

made, and entered as aforesaid, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated this 2nd day of August, 1909.

THE UNITED STATES OF AMERICA,
By A. I. McCORMICK,
United States Attorney.

Service upon me of the within petition for writ of error is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

45 VALENTINE & NEWBY,
Attorney for defendant, Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Petition for writ of error. Filed Aug. 2, 1909. E. H. Owen, clerk.

46 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. | No. 166. Crim.

Assignment of errors.

Now comes the United States of America, plaintiff herein, and says that in the record and proceedings in the above-entitled cause there is manifest error, and now makes, presents, and files the following assignment of errors, upon which said the United States of America will rely upon the prosecution of the writ of error in the above-entitled cause:

I.

That the District Court of the United States in and for the Southern District of California, Southern Division, erred in sustaining the demurrer interposed by the defendant, William B. Hammers, to the indictment in the said cause.

II.

That the said District Court erred in holding, deciding, and adjudging that said indictment did not state a public offense against the laws of the United States.

III.

That the said District Court erred in holding, deciding, and adjudging that the act of Congress approved March 3, 1877 (19 Stat. at L., 107; U. S. Comp. Stat., 1901, p. 1548), as amended and supplemented by act of Congress approved March 3, 1891 (26 Stat. at L.,

1095; Comp. Stat., 1901, p. 1549), and the subsequent acts amendatory thereof and supplemental thereto, all known as the desert land acts, do not authorize or permit an assignment of an entry of desert lands made under said desert land acts at any time prior to the completion of the reclamation and cultivation to the extent
47 and cost and in the manner required by said acts, and in basing its said decision and judgment sustaining said demurrer on that ground.

IV.

That the said District Court erred in its construction of said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, known as the desert land acts, wherein and whereby it held and decided that said desert land acts do not authorize or permit an assignment of an entry of desert lands made under said desert land acts at any time prior to the *the* completion of the reclamation and cultivation to the extent and cost and in the manner required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

V.

That the said District Court erred in holding, deciding, and adjudging that an assignment of an entry of desert lands made under the said desert land acts is not, at any time prior to the completion of reclamation and cultivation to the extent and cost and in the manner required by said acts, permitted or authorized by said desert land acts and is unlawful and void, and in basing its decision and judgment sustaining said demurrer on that ground.

VI.

That the said District Court erred in its construction of said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, known as the desert land acts, wherein and whereby it held and decided that an assignment of an entry of desert lands made under the said desert land acts is not, at any time prior to the completion of reclamation and cultivation to the extent and cost and in the manner required by said acts, permitted or authorized by
48 said desert land acts and is unlawful and void, and in basing its decision and judgment sustaining said demurrer on that ground.

VII.

That the said District Court erred in its construction of the said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, wherein and whereby it held and decided that Congress in passing said acts did not intend or contemplate the absolute and unqualified assignability of desert land entries lawfully initiated under

said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

VIII.

That the said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that Congress, in passing said act, did not intend or contemplate the absolute and unqualified assignability of desert land entries under said desert land acts, and in basing its decision and judgment sustaining said demurrer on that ground.

IX.

That the said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that said act of March 3, 1891, did not permit or authorize an assignment of an entry under said desert land acts, at any time or at all, prior to the completion of reclamation and cultivation to the extent and cost and in the manner required by said desert land acts, and in basing its decision and judgment sustaining said demurrer on that ground.

X.

That the said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that said act of March 3, 1891, prohibited and made unlawful an assign-
49 ment of an entry under said desert land acts at any time prior to complete reclamation and cultivation as required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XI.

That said District Court erred in its construction of said acts of March 3, 1877, and the acts amendatory thereof and supplemental therto, known as the desert land acts, wherein and whereby it held and decided that said acts of March 3, 1877, and the acts amendatory thereof and supplemental thereto prohibited and made unlawful an assignment of an entry under said desert land acts at any time prior to complete reclamation and cultivation as required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XII.

That said District Court erred in holding, deciding, and adjudging that an assignment of a bona fide entry of desert lands made under and by virtue of said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto by a qualified entryman, is not authorized or permitted by said acts and is unlawful and void and that therefore an oath taken by a proof witness before a competent and

qualified officer to an affidavit of the annual expenditure for the first year on said assigned entry (said oath being taken and said affidavit made for and on behalf of the assignee of said entry and as a part of the proceedings on and concerning said entry and with the intention and for the purpose of being thereafter filed with the register of the proper United States land office as a part of said proceedings), is not an oath in any case in which any law of the United States authorizes an oath to be administered, and in basing its decision and judg-
50 ment sustaining said demurrer on that ground.

XIII.

That the said District Court in holding, deciding, and adjudging that an oath taken before a qualified officer by a proof witness to an affidavit of the annual expediture required by said act of March 3, 1891, in a proceeding on an entry of desert lands under said desert land acts made in good faith by a qualified entryman and which said entry had been in good faith assigned prior to the taking of said oath, said affidavit being for and on behalf of said assignee, is not an oath taken "in any case in which a law of the United States authorizes an oath to be administered," as provided by section 5392 Rev. Stat., and in basing its decision and judgment sustaining said demurrer on that ground.

XIV.

That said District Court erred in its construction of section 5392 of the Revised Statutes of the United States, wherein and whereby it held and decided that the crime of perjury as defined in said section 5392 is not and can not be committed by a person who, as a proof witness for and on behalf of the assignee of an assigned desert land entry, takes an oath before a competent officer, and under said oath swears falsely to material matters in the affidavit of annual expenditures made by said assignee for the first year as required by said desert land acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XV.

That said District Court erred in its construction of section 5392 of the Revised Statutes of the United States wherein and whereby it held and decided that an oath taken by a proof witness for and on behalf of an assignee of a bona fide entry under said desert land
51 acts, before a competent officer, to an affidavit of the annual expenditure and reclamation for the first year on said assigned entry (said oath being taken and said affidavit made for and on behalf of the assignee of said entry and as a part of the proceedings on and concerning said entry and with the intention and for the purpose of being thereafter filed with the register of the proper United States land office as a part of the proceedings on said entry as required by

said desert land acts), is not an oath taken "in any case in which a law of the United States authorizes an oath to be administered," as provided in and by said section 5392 of the Revised Statutes of the United States, and in basing its decision and judgment sustaining said demurrer on that ground.

XVI.

That said District Court erred in its construction of said act of March 3, 1891, wherein and whereby it held and decided that said act did not grant or create the right of assignment of an entry of desert lands under said desert land acts at any time or at all prior to the completion of the reclamation and cultivation as required by said acts, and in basing its decision and judgment sustaining said demurrer on that ground.

XVII.

That said District Court erred in its construction of the said act of March 3, 1877, and the acts amendatory thereof and supplemental thereto, all known as the desert land acts, wherein and whereby said court held and decided that under and by virtue of said desert land acts, and especially under and by virtue of the act of March 3, 1891, no one but the party making the original desert land entry, that is to say, no one but the original declarant, could lawfully make the expenditures or perform the work or make or file the proof required by said act for the first three years, or either or any of said
52 years, and that, therefore, an oath taken by a proof witness before a competent and qualified officer to an affidavit of the annual expenditure for the first year on an assigned desert land entry (said oath being taken and said affidavit made for and on behalf of the assignee of said entry and as a part of the proceedings on said entry and with the intention and for the purpose of being thereafter filed with the register of the proper United States land office as a part of said proceedings) is not an oath in any case in which a law of the United States authorizes an oath to be administered, and in basing its decision and judgment sustaining said demurrer on that ground.

XVIII.

That said District Court erred in holding, deciding, and adjudging that the oath of the defendant, William B. Hammers, which said oath was taken and administered under the circumstances and for the purposes set forth and alleged in the indictment, was not an oath taken in any case in which any law of the United States authorizes an oath to be administered, and that the offense of perjury as defined in section 5392, Revised Statutes, could not be predicated upon said oath.

XIX.

That said District Court erred in refusing to overrule said demurrer of the said defendant and in refusing to compel said defendant to plead to said indictment.

Wherefore the said United States of America, plaintiff herein, prays that the said decision and judgment of the said District Court of the United States for the Southern District of California, Southern Division, and the whole thereof, be in all things reversed, and that the United States District Court be directed to reinstate said indictment and to overrule the demurrer of the said defendant, and to compel the said defendant to plead to the indictment in
53 said cause.

A. I. McCORMICK,
United States Attorney for the Southern District of California, and Attorney for Plaintiff.

Service upon me of the within assignment of errors is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Assignment of errors. Filed Aug. 2, 1909. E. H. Owen, clerk.

54 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

Order allowing writ of error.

Upon reading and filing the petition of the United States of America, plaintiff in the above entitled cause, praying for the allowance of a writ of error in the above entitled cause returnable before the Supreme Court of the United States, and upon reading and filing the assignment of errors presented with said petition, and on motion of A. I. McCormick, esq., United States attorney for the Southern District of California and attorney for plaintiff herein,

It is hereby ordered that the said petition be, and the same is hereby, allowed and granted; and

It is further ordered that a writ of error be and the same hereby is allowed to have reviewed in the Supreme Court of the United States the decision and judgment of this court sustaining the demurrer of the defendant to the indictment in this action, heretofore given, made, rendered, and entered in the above entitled cause, and that said writ

of error be issued by the clerk of the Circuit Court for this district, under the seal of said Circuit Court, pursuant to section 1004 of the Revised Statutes of the United States; and

It is further ordered that a certified transcript of the record, proceedings, and papers herein be transmitted to the said Supreme Court of the United States.

55 Dated this 2nd day of August, 1909.

OLIN WELLBORN,
Judge of the United States District Court,
Southern District of California.

Service upon me of the within order allowing writ of error is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, So. Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Order allowing writ of error. Filed Aug. 2, 1909. E. H. Owen, clerk.

56 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEPENDANT. } No. 166. Crim.

Certificate of court.

I, the undersigned, Olin Wellborn, United States district judge for the Southern District of California, do hereby certify that the decision and judgment in the above entitled cause, given, made, rendered, and entered by this court on the 12th day of July, 1909, and which said decision and judgment the plaintiff, The United States of America, is taking to the Supreme Court of the United States by writ of error, and in and by which said decision and judgment the demurrer to the indictment was sustained, was based solely upon the construction of the act of Congress approved March 3, 1877, entitled "An act to provide for the sale of desert land entries in certain States and Territories" (19 Statutes at Large, 107; U. S. Comp. Statutes, 1901, page 1548), as amended and supplemented by the act of Congress approved March 3, 1891, entitled "An act to repeal timber culture laws and for other purposes" (26 Statutes at Large, 1095; Comp. Stat., 1901, page 1549), and the subsequent acts of Congress amendatory thereof and supplemental thereto, all known as the desert land acts, and of section 5392 of the Revised Statutes of the United States.

I further certify that the reasons and grounds for the said decision and judgment are given and set forth in full in the written

conclusions of this court filed in this court on the 12th day of July, 1909, a copy of which said conclusions are incorporated in the bill of exceptions in this cause.

Dated this 2nd day of August, 1909.

OLIN WELLBORN,
District Judge.

57 Service upon me of the within certificate of court is hereby acknowledged by receiving a copy thereof this 2d day of August, 1909.

VALENTINE & NEWBY,
Attorney for defendant Wm. B. Hammers.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the Southern District of California. Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Certificate of court. Filed Aug. 2, 1909. E. H. Owen, clerk.

58 In the District Court of the United States in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT.

Order extending time.

Good cause appearing therefor, it is hereby ordered that the United States of America, plaintiff in the above entitled cause, may have and is hereby given up to and including the 11th day of August, 1909, in which to prepare, serve, and file its bill of exceptions in the above entitled cause.

OLIN WELLBORN,
District Judge.

Dated this 22d day of July, 1909.

(Endorsed:) No. 166. Crim. In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff, vs. William B. Hammers, defendant. Order extending time. Filed July 21st, 1909. E. H. Owen, clerk.

59 In the District Court of the United States in and for the Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
WILLIAM B. HAMMERS, DEFENDANT. } No. 166. Crim.

I, E. H. Owen, clerk of the District Court of the United States of America in and for the Southern District of California, do hereby certify the foregoing fifty-eight (58) typewritten pages, numbered from 1 to 58, inclusive, and comprised in one (1) volume, to be a full, true, and correct copy of the records, pleadings, and all proceedings

and papers upon which the demurrer to the indictment was sustained and the indictment dismissed, also of the bill of exceptions, petition for writ of error, assignment of errors, order allowing writ of error, certificate of the judge in the above entitled cause, and that
60 the same together constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court of the United States of America, this 14th day of August, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] E. H. OWEN.
Clerk United States District Court in and for the Southern District of California.

61 In the District Court of the United States in and for the Southern District of California, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM B. HAMMERS, DEFENDANT.

Order extending time within which the writ of error and the citation herein is returnable.

Good cause being shown therefor, and in accordance with subdivision 4, rule 9, of Rules of the Supreme Court of the United States of America, it is hereby ordered that the time within which the writ of error and the citation allowed and issued in the above entitled action is made returnable, and within which the plaintiff in error is required to docket said cause and file the record thereof with the clerk of said Supreme Court, be, and the same is hereby, extended and enlarged to sixty days from the second day of August, 1909, on which said day said citation was signed.

Dated this 13th day of August, 1909.

OLIN WELLBORN,
District Judge.

62 Service of the within order by copy thereof is hereby admitted this 14th day of August, 1909.

VALENTINE & NEWBY,
Attorneys for William B. Hammers.

(Indorsed:) No. . In the District Court of the United States for the So. Dist. of California, Southern Division. United States of America, plaintiff vs. William B. Hammers, defendant. Order extending time within which the writ of error and the citation herein is returnable.

(Indorsement on cover:) File No. 21807. S. California D. C. U. S. Term No. 581. The United States, plaintiff in error, vs. William B. Hammers. Filed August 30th, 1909. File No. 21807.

O

Office Supreme Court, U. S.
FILED.
MAR 20 1911
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1909. 1910

No. ~~381~~ 314

United States of America,
Plaintiff in Error,
vs.
William ~~H.~~ B. Hammers,
Defendant in Error.

Motion for Leave to File Brief and Make Oral Argument as Amici Curiae.

OSCAR A. TRIPPET,
J. M. ESHELMAN,
LECOMPTE DAVIS and
WM. C. PRENTISS.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1909.

No. 581.

United States of America,
Plaintiff in Error,
vs.
William B. Hammers,
Defendant in Error.

Motion for Leave to File Brief and Make Oral Argument as Amici Curiae.

Now come Oscar A. Trippet, J. M. Eshleman LeCompte Davis and Wm. C. Prentiss, attorneys for Frank N. Chaplin and David H. Chaplin, defendants in the case of United States v. Chaplin, *et al.*, now pending in the U. S. Circuit Court of Appeals for the Ninth Circuit, and respectfully ask leave as *amici curiae* to file a brief and make an oral argument herein, attacking the construc-

tion placed by plaintiff and defendant herein upon section 1 of the Desert Land Act of March 3rd, 1877, entitled, "An Act to Provide for the Sale of Desert Lands in Certain States and Territories" (19 Stats. 377), which construction is involved herein, being invoked by the defendant as sustaining its claim that a desert land entry cannot be assigned before completion of reclamation of the entered land, and also attacking the construction placed by the defendant Hammers and by the lower court in this case upon section 5 of the amendment to the Desert Land Act of March 3rd, 1891 (26 Stats. 1095).

OSCAR A. TRIPPET,
J. M. ESHLEMAN,
LECOMPTE DAVIS, and
WM. C. PRENTISS.

And in support of this motion, your petitioners respectfully represent and show unto the court that the true construction of said section 1 of the original desert land act of March 3, 1877, is directly involved in and is conclusive of the case of U. S. v. F. N. Chaplin, *et al.*, now pending in the U. S. Circuit Court of Appeals for the Ninth Circuit, from the Southern District of California, and that the decision of this court in this case as to the true construction of such section will materially affect and be decisive of the rights of the defendant in that case. And your petitioners further represent and show that the

construction placed by the defendant Hammers and by the lower court in this case upon section 5 of the amendment to the Desert Land Act of March 3rd, 1891, and necessarily involved in the decision of this case by this court will materially affect the rights of the defendants in the said pending case of United States v. Chaplin. That this may more fully appear to the court, your petitioners respectfully show and represent to the court as follows:

That upon July 12, 1909, the District Court of the United States for the Southern District of California, Southern Division (Honorable Olin Wellborn, judge), in the present case of United States v. Hammers, sustained a demurrer to an indictment for perjury based upon the falsity of an affidavit of first annual proof made by an assignee of a desert land entry; the affidavit alleging the expenditure by such assignee of one dollar per acre during the first year after such entry, in reclaiming from its desert state, the land in question. The lower court held that as the law did not permit a desert land entry to be assigned prior to the completion of reclamation, an oath by the assignee prior to the completion of reclamation, showing money expended by him in reclamation, was not authorized by law, and hence perjury could not be predicated upon the falsity of such an oath; therefore, the demurrer to the indictment was sustained by the lower court.

The government appealed from such decision to this court, and the question directly involved here is, "Can an entryman of desert lands lawfully sell or assign his entry before completion of reclamation of the entered land?" Upon this appeal counsel for defendant Hammers maintains that a desert land entry cannot be lawfully assigned until after the completion of the reclamation of the entered land; and as one of the reasons for so claiming, such counsel maintain (in an advance draft of their brief in this case furnished us) that this cannot be done because section 1 of the original Desert Land Act requires that a desert land entryman must, at the time of original entry, *intend* to personally reclaim the entered land, and *therefore* he must *actually* personally *reclaim* the land, and *cannot assign it before reclamation*, and that reclamation cannot be made by the assignee, and proof of reclamation cannot be made by the assignee. Counsel for defendant Hammers also relies upon section 5 of the amendment to the Desert Land Act of March 3rd, 1891, as sustaining the view that a desert land entry can not be assigned before completion of reclamation of the entered land.

The government, on the other hand, maintains that the entryman may lawfully assign his entry at any time after it is made and before the completion of the reclamation, and that reclamation may be made by the assignee and proof of recla-

mation made by the assignee. The government, however, concurs in the construction placed by defendant Hammers upon section 1 of the original Desert Land Act, and concedes the claim made by the defendant Hammers that a desert land entryman must, at the time of the original entry, *intend* to personally reclaim the entered land and cannot *intend* to sell or assign his entry before the completion of the reclamation. And the government is now contending for and urging this position in the case of United States v. Chaplin, now pending in the Circuit Court of Appeals, for the Ninth Circuit, the government having succeeded in inducing the trial court in such case to so hold, and such decision is now being cited and relied upon by the defendant Hammers here as sustaining his position in this case. It will therefore be seen that upon this question of the necessity of the entryman's *intent* to personally reclaim the entered land, the government and defendant Hammers both maintain that such *intent* is essential to a valid entry.

On the same day upon which the lower court rendered its decision in this, the Hammers case, namely, upon July 12, 1909, and immediately prior to rendering such decision, the same court (Honorable Olin Wellborn, judge) also rendered the decision in the case of United States v. Frank N. Chaplin, *et al.*, above mentioned, overruling a demurrer interposed to an indictment charging

the defendants therein with conspiracy to defraud the United States of the use and possession of and title to certain desert lands in the Imperial Valley in California under the provisions of the United States Desert Land Laws. The indictment in such case charges that the defendants had conspired to induce parties to make desert land entries who would not intend, at the time of making such entries, to reclaim the same by conducting water thereon within four years. The demurrer to the indictment raises the point that the law does not require a desert land entryman, at the time of entry, to *intend* to personally reclaim the land by conducting water thereon within four years, but that such an entry could be lawfully made, although the entryman intended to sell or assign his entry to any qualified assignee at the first opportunity offering; and hence it is claimed by the defendants in that (the Chaplin) case, that a conspiracy to cause desert land entries to be made by parties who would not intend to personally reclaim the entered land, but who would intend to sell or assign their entries before the completion of reclamation, is no offense. This position the lower court rejected and the demurrer to the indictment was overruled. The case came on for trial, and the defendants Frank N. Chaplin and David H. Chaplin were found guilty as charged and were sentenced to a fine and imprisonment. The case was taken

upon writ of error to the Circuit Court of Appeals for the Ninth Circuit, and is now pending in such court, and on the docket to be heard at the May term of such court, this year. The bill of exceptions in such case waives all questions except those raised by the demurrer to the indictment.

The court will see at a glance the similarity of the questions involved in this case, and in that case, and the respect in which the decision in this case will affect the decision in that case.

First. If this court should hold in this case, as contended by the defendant Hammers, that a desert land entry cannot be assigned before the completion of the reclamation of the lands entered, it would naturally follow that a desert land entryman could not *intend* to assign his entry before completion of reclamation, and this conclusion would not only affect, but might be decisive against, and fatal to, the contention of the defendants in the Chaplin case.

Second. If the court should hold in this case that a desert land entryman could lawfully assign his entry at any time after the entry was made, and should not pass upon the question as to whether or not a desert land entryman could, at the time of making his entry, *intend* to assign it, such a decision would be of great value to, but not necessarily decisive of the defendant's contention

in the Chaplin case, as it would enable the defendant to argue that as the right to assign is a lawful right, and an assignment a lawful act, the right to intend to exercise a lawful right, or to do a lawful act, could not be criminal.

Third. If, however, the court should in this case hold that a desert land entryman need not *actually* reclaim, or *intend* to reclaim, but that he could *actually assign* and could, when he made his original entry, *intend to assign,* then such a decision of the court would be conclusive of the pending case of U. S. v. Chaplin, in favor of the defendants Chaplin.

Fourth. Should the court in this case hold, as contended by the government, that a desert land entryman may lawfully assign his entry at any time after it is made, but that he cannot, at the time of entry, *intend* so to do, this latter conclusion would be fatal to the contention of the defendants in the case of U. S. v. Chaplin; and in view of the fact that in this case, both the defendant Hammers and the government are concurring in the contention that a desert land entryman cannot, at the time of entry, *intend* to assign his entry before completion of reclamation, the danger of the court concurring in the correctness of such construction of the law,—when this construction is strongly urged by one party and conceded to be correct by the other,—is most immi-

nent; and as this position, if taken by the court, would be fatal to the defense of the defendants in the Chaplin case, the importance of an appearance in behalf of, and argument in support of the claim made by the Chaplins in their pending case, is more obvious than it would be if one of the parties to this case were presenting to the court and contending for the view of the law necessary to sustain the defendant's position in the Chaplin case.

Ordinarily, the views of an *amicus curiae* are in harmony with those being presented by one or the other of the parties to the controversy in which he seeks to be heard, and he usually merely desires to present further or supplemental points, arguments or authorities in harmony with such views. But in this case both of the parties litigant, we believe will concur in contending for a construction of the law that is fatal to the rights of the party applying to be heard as *amicus curiae*, and which construction, if adopted by the court, would pre-judge against such party the law of his case upon a purely *ex-parte* argument.

As *amici curiae*, we claim that a desert land entryman need not reclaim, nor *intend* to reclaim the entered land, but may assign and *intend* to assign, and that the assignee may lawfully reclaim. The defendant Hammers in this case will claim that the entryman must *both reclaim* and *intend* to reclaim, and cannot *either assign* or *intend* to as-

sign, and that the assignee cannot lawfully reclaim or make proof thereof.

The government will claim that the entryman need not *actually* reclaim, but must *intend* to reclaim, and that the entryman can assign, but cannot *intend* to assign.

It will thus be seen that we differ from both the appellee and appellant in that we maintain that an entry need not be made with an *intent* of reclaiming, but may be made with an *intent* of assigning, and that we agree with the government and differ with the appellee, in that we hold that the entryman need not actually reclaim, but that an entry may be assigned, and that reclamation may be made by an assignee direct or remote of the entryman.

Both counsel for the government and counsel for the defendant Hammers concede that since the Desert Land Act was amended in 1891, the Land Department has uniformly held that desert land entries may be assigned at any time after they are made, and that reclamation may be made by the assignee and proof of reclamation made by the assignee, and patent issue to the assignee. Under the decision, however, of the lower court, in this, the Hammers case, this practice of the Land Department is held to be illegal, and it is held that an assignee of a desert land entry may with impunity swear falsely as to the moneys expended by him in reclamation—*the very vital, es-*

sential feature of the law—and yet be immune from criminal prosecution for perjury; while the same court has held in the Chaplin case, *supra,* that if a desert land entryman, relying upon the practice permitting assignments prevailing in the Land Department for all these years, makes an entry merely *intending* to assign it before reclamation,—as he had for eighteen years been allowed by the Land Department to do,—he is guilty of perjury, and those who advise him he can so do, are guilty of conspiracy to defraud the United States.

In the advance draft of their brief in this case, which has been furnished us, counsel for the defendant Hammers cite, quote from, rely upon and invoke the soundness of the decision of Judge Wellborn in the case of U. S. v. Chaplin, *et al.* The government, while it is maintaining the soundness of such decision and seeking to sustain it in that case, now pending in the Circuit Court of Appeals, is possibly precluded in this case from taking a contrary position, no matter how sound such contrary view may be, or how essential such contrary view may be to meet the most formidable argument urged here by the attorneys for Hammers. At any rate, the government in this case,—while it may claim that the law of the Chaplin case is not necessarily involved in this case,—will probably not attack, and will probably contend for the soundness of the

decision of the lower court in the Chaplin case. This emphasizes the necessity and importance of attorneys for the Chaplins being permitted to be heard in this case as *amici curiae,* to present such contrary view, so that it may be shown, as we believe it can be shown, that the lower court erred both in the Chaplin case and in this case, and that it may be shown how, and wherein, the error of the lower court in its reasoning in the Chaplin case is responsible for its error in this case.

Therefore, the undersigned respectfully asks leave of court to file a brief herein, and to make an oral argument herein as *amici curiae.*

OSCAR A. TRIPPET,
J. M. ESHELMAN,
LECOMPTE DAVIS and
WM. C. PRENTISS.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
WILLIAM B. HAMMERS. } No. 581.

MOTION TO ADVANCE.

The defendant in error was indicted for perjury in the District Court of the United States for the Southern District of California.

On August 14, 1907, Granville M. Boyer made an original entry of certain desert lands, and on August 26 of that year he made a written assignment and transfer thereof to Buelah Rose Beekler. On January 30, 1908, Beekler, as the assignee of said land entry, and then owner thereof, made her first annual proof as required by the desert-land act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1096), using the defendant in error and Josephine Hammers, his wife, as her proof witnesses. For alleged false testimony then given the defendant in error and Josephine Hammers were separately indicted for perjury.

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Demurrers to the indictments were interposed on the ground that the act of 1877, as amended, does not authorize or permit the assignment of desert land entries, and the proof offered by Beekler was not in a proceeding authorized by any law, and that therefore the alleged false swearing by Hammers and his wife was not under oath "in any case in which a law of the United States authorizes an oath to be administered," as provided by section 5392 of the Revised Statutes. The District Court sustained the demurrers, and the Government has sued out this writ of error under the provisions of the act of March 2, 1907 (34 Stat., 1246).

Action on the demurrer to the indictment in the case of Josephine Hammers is withheld pending the determination of this case.

In accordance with the provision of the act of March 2, 1907, that writs of error thereunder "shall be diligently prosecuted and shall have precedence over all other cases," the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on a day during the present term.

Notice of this motion has been served upon counsel for defendant in error in the court below.

LLOYD W. BOWERS,
Solicitor-General.

DECEMBER, 1909.

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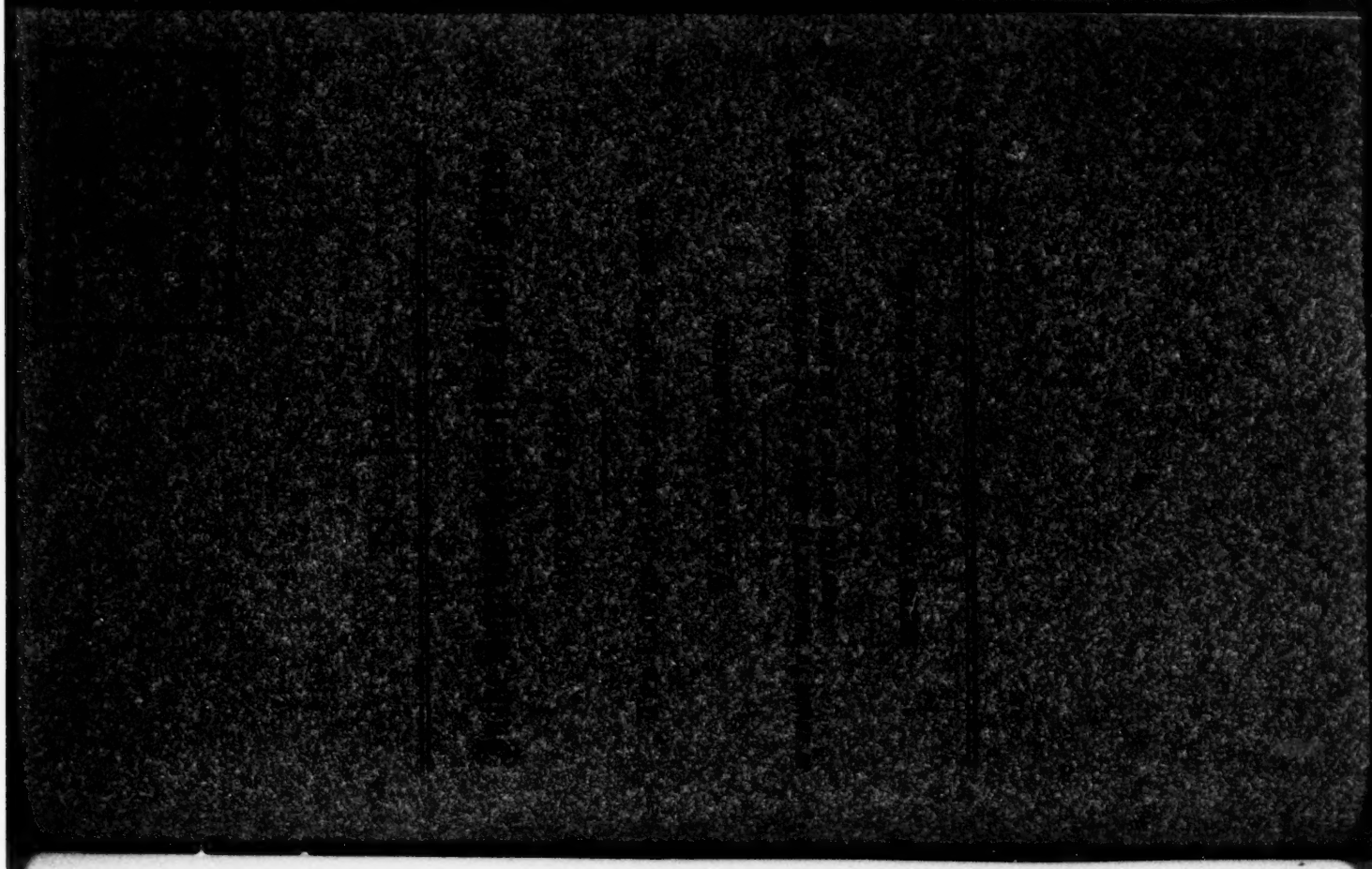

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN error,
v.
WILLIAM B. HAMMERS. } No. 314.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is brought here by writ of error taken pursuant to the act of March 2, 1907 (34 Stat. L., 1246), to review a decision (R. 11) of the district court for the southern district of California, sitting in the southern division thereof, sustaining a general demurrer (R. 15) to an indictment charging William B. Hammers with perjury in violation of section 5392 of the Revised Statutes. The alleged false testimony was given by Hammers when called as a witness in support of an entry of desert land originally made by one Boyer but then claimed by a woman

named Beekler under an assignment from Boyer. The desert land laws, which will be set out fully in the proper place, provide that, during each of the three years next succeeding the preliminary entry of desert land, proof shall be made by at least two credible witnesses of the expenditure of the full sum of one dollar per acre in the necessary reclamation, improvement, etc., of the land during that year; and that failure to file such testimony during any such year shall work a reverter of the lands to the United States and a forfeiture of the advanced payment of twenty-five cents per acre required to be made with the filing of the initial declaration.

Another law (hereinafter quoted) allows such testimony to be taken before clerks of state courts of record for transmission to the register and receiver with whom the entry is pending. Act of March 4, 1904, 33 Stat. 59, amending R. S., sec. 2294.

The indictment (R. 2 et seq.), in a single count, alleges, in apt form, that the defendant, Hammers, appeared at a place within the jurisdiction of the trial court as a witness in a proceeding before one Daniel S. Elder, Clerk of the Superior Court of Imperial County, California, a court of record, in which proceeding Beekler was making her first yearly proof of improvement, irrigation, reclamation and cultivation of land claimed by her under the Desert Land Laws; and that Hammers, being duly sworn as such witness by the said clerk, wilfully, knowingly, unlawfully, corruptly and feloniously made oath to the

truth of written testimony, then and there subscribed by him, wherein he falsely stated, (in substance) that the sum of two hundred and fifty dollars—that is, not less than one dollar for each acre of the land embraced in the desert claim, was expended in necessary irrigation, reclamation and cultivation of the land during the first year after the date of the entry thereof, and set forth in detail how the money was applied. The purpose of Beekler's application, it is averred, was to comply in form with the laws under which the entry was made, in order that she might ultimately procure a patent for the land. In appropriate fashion the indictment charges that Elder, the clerk, was in his official capacity authorized by the public land laws of the United States to receive the proofs, and was duly qualified and competent to administer the oath; that the matters sworn to by Hammers were material to the first yearly proof of improvement, irrigation, reclamation and cultivation of the land, pursuant to the entry, under the acts of Congress in such case made and provided, and material to the proof necessary to enable Beekler ultimately to obtain patent; and that the purpose of Hammers in giving the testimony was to assist Beekler toward getting her patent. With careful specification it falsifies the testimony given, which, it adds, was subsequently filed, as part of the proceedings relating to the entry, with the register and receiver of the United States Land Office in which the entry proceedings were pending.

The pleading as such was not criticized, and doubtless is beyond criticism. The feature which afforded the sole ground for the lower court's decision is found in the averments which show that the testimony was given in support of Beekler's claim *as assignee* of the original entryman. The trial court held (see opinion R. 12, 20):

> First. That the assignment was not authorized by the desert land laws.
>
> Second. That, therefore, the false testimony was "immaterial".

The first of these propositions was developed by the court with some elaboration. The second was stated as a necessary deduction from the first, but without discussion. Thus it is manifest that the decision sustaining the demurrer was, within the meaning of the act of March 2, 1907, (34 Stat. L. 1246), based upon construction of the statutes upon which the indictment was founded, namely, the desert land laws, in so far as they permit or prohibit assignments before final proof, and section 5392 of the Revised Statutes, denouncing as perjury the wilful giving of false testimony upon "*any material matter*", by any person duly sworn to speak the truth, "before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered", and the amendment of section 2294 of the Revised Statutes (33 Stats., 59) which deals with false swearing before the officials therein authorized to take depositions relating to land entries.

SPECIFICATIONS OF ERROR RELIED ON.

The assignment contains nineteen specifications of error which may be reduced to two, thus:

I.

Error in holding that the false testimony was not "material" within the meaning of the perjury statutes, irrespective of the validity of the assignment of the desert land entry.

II.

Error in holding that the assignment of the desert land entry was invalid.

Either of these specifications, if sustained, calls for a reversal of the judgment and renders unnecessary a decision upon the other. The first is, however, of vastly more importance, since the principles upon which it rests are vitally necessary to an efficient administration of the land department, as well as all other departments of the public service, wherein facts are to be decided upon sworn testimony and the law is to be construed and applied.

The following propositions will be advanced in argument:

ARGUMENT.

I.

The false testimony was "material," whether the assignment was valid or invalid, since

1. It tended strongly to support a claim under the desert land laws which the Land Department had jurisdiction to adjudicate, and

2. Jurisdiction existing to adjudicate the claim which the false testimony supported, such testimony was none the less "material" because allowance of the claim might be erroneous.

II.

The assignment was lawful, because:

1. The desert land law, as amended in 1891, expressly permits assignment after original entry and before final proof.

2. Even if the law be not entirely clear on this point, the doubt should be resolved in favor of assignability; for

There is no express prohibition or evident policy against alienation after entry, and, such being absent, the law, upon general principles, favors the existence of the right;

The contemporaneous and continuous construction of the amended act by the Land Department permits such assignments;

In the proceedings in Congress attending its passage, the act of 1891 was interpreted as intending such assignments, and this intent has been recognized in more recent laws.

These propositions will now be taken up in their order.

I.

THE FALSE TESTIMONY WAS "MATERIAL" WHETHER THE ASSIGNMENT WAS VALID OR INVALID.

The entry was made, in due form, by Boyer, who, some twenty days later, assigned his rights thereunder to Beekler. The latter thereupon filed the instrument

of assignment in the local land office where the entry was pending, and thereupon, *according to the construction of the law by the Land Department, then settled and continuous for at least sixteen years,* became the legal substitute of Boyer, with full right to carry out the entry and obtain a patent in her own name by complying with the conditions as to payments, reclamation and improvements laid down in the statute. If Beekler had done this honestly, without a shadow of doubt she would in due course have obtained a patent.

Section 5 of the act of March 3, 1891, amending the original Desert Land Law of 1877, provides as follows:

> Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: *Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid,* and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. *Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum*

> *of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended,* * * * If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents (per acre) advanced payment shall be forfeited to the United States, and the entry shall be cancelled. * * * 26 Stat., 1095.

The testimony of the defendant was given as part of the first yearly proofs of reclamation etc., required by this section, Hammers being offered by Beekler as one of the "two or more credible witnesses" whom the latter was obliged to produce to sustain her claim in good standing and save it from forfeiture. The deposition was given before the clerk of the superior court of Imperial County, a court of record (Rec. 5, 6), pursuant to the act of March 4, 1904, 33 Stat. 59, amending R. S. 2294 as follows:

> SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits,

proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take such affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. *That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, wilfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury,* and shall be liable to the same pains and penalties as if he had sworn falsely before the register. * * *

The competency of the clerk to administer the oath is expressly averred (Rec., 5, 6), in the way approved by section 5396 of the Revised Statutes, and the indictment shows in addition that, pursuant to the requirement of the act last above quoted, the false deposition was subsequently filed with the register and receiver of the land office at Los Angeles,

where the entry was pending, as part of the entry proceedings (p. 8).

Revised Statutes, section 5392, under which the indictment was returned (see endorsement Rec., 9), is as follows:

> Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

Whether the indictment was properly returnable under this section rather than the last part of section 2294, or both of them, is not a matter of importance. (*Williams* v. *United States*, 168 U. S., 382, 389; *Caha* v. *United States*, 152 U. S., 211, 216.) The laws, being *in pari materia*, and the one referring to the other for the penalty, should be taken together, and it will be observed that the indictment amply sets forth all of the elements of the offense which both together define.

The court below held that the entire affidavit or deposition subscribed and sworn to by the defendant was immaterial, in face of the perfect logical adaptation of the statements therein contained to support the claim in behalf of which the deposition was given. The deduction of immateriality flowed entirely from the finding that the assignment was unlawful. The words of the trial court on this subject are (Rec. 12):

> Defendant contends that the law did not authorize the assignment, and therefore, the affidavit was immaterial; so that the only question presented by the demurrer is whether or not a desert land entry may be assigned before the work of reclamation has been completed.

Having discussed this question and found no authority for the assignment, the court proceeded as of course to set aside the indictment upon the assumption that the matter of the assignee's application lay wholly without the jurisdiction of the Land Department.

1. The false testimony supported a claim under the desert land laws which the Land Department had jurisdiction to adjudicate.

The fallacy of the position of the lower court lies in the assumption (necessarily implied) that the jurisdiction of the Land Department to adjudicate claims to land under the land laws is confined to such as are based upon correct construction of those laws as it may subsequently be declared by the courts. Had there been no assignment, and had the applica-

tion to submit proof of reclamation been made directly by the original entryman, the trial court would have been obliged to hold that the matter was one within the jurisdiction of the Department, that the official before whom, as its *quasi* examiner, the proof was offered, was authorized by a law of the United States to administer the oath, and that the testimony given by the defendant was very material to the subject in hand. So, if the court, in construing the desert-land legislation, had arrived at a different conclusion on the question of assignment, it must necessarily have held that the official was competent to administer the oath, that the laws authorized it, and that the testimony was material. The decision must mean that the whole proceeding was an absolute nullity; that every proceeding before the Land Department concerning a claim not founded upon a correct exposition of the land laws, is equally a nullity; that that Department, while charged with the duty of understanding those laws and administering them rightly, is bereft of all power to make mistakes concerning them, and that every step which it takes looking to the adjudication of a claim not advanced upon a correct theory of the statutes, is absolutely void. The decision means that if the assignee had obtained a patent under the desert-land entry, the patent would be *literally void*—a mere piece of waste paper—because the law, properly interpreted, did not permit the assignment. It means that all of the scores of patents already granted in like cases are similarly void; in fine, that every

patent issued by mistake of law is, legally considered, *nothing.*

The truth is that the principal business of the Land Department consists in the interpretation and application of the land laws, and to receiving and adjudicating the claims submitted under them. It is just as much its duty to reject claims not authorized by law as to allow those which are, and, in order to accomplish this process of separating the sheep from the goats, it is obliged to entertain, examine, and pass upon the several claims, good and bad, as they are presented, and in so doing to exercise jurisdiction. Every one of these claims, until finally passed upon (assuming that it respects land over which the Department has dispository power) is, in a proper sense, a matter within its jurisdiction, and when in fact, by an error of law, it issues a patent for such land, the patent, though voidable, is not by any means a legal nullity.

The claim of the assignee was a claim pending before the Land Department which, according to the settled construction of the desert land law by that department, would have been sustained as valid upon proper proof. In that event the assigned entry would certainly have culminated in a patent of at least *prima facie* validity. The claim was to specific land within the disposing power of the department, was based upon a law under which the land might properly be acquired, and was therefore a claim which the department was obliged to sustain or reject according to its construction of the law

applied to the facts judicially ascertained. So that, even if it could be said (which it can not) that the land department would certainly have rejected this claim on the ground of nonassignability of the entry, it can not be said that the department was without jurisdiction to decide the contrary, sustain the claim on false testimony, and cause to be issued a *prima facie* valid patent to the land. A patent thus issued can not be revoked or recalled by any action of the executive branch of the government. It stands as a cloud upon the title of the United States which only the judiciary, in a direct proceeding brought in the name of the United States, is competent to remove, and which, if allowed to rest unchallenged for six years, would deprive the United States of all title, legal and equitable, to the land which it purports to convey.

Such a patent would not be one which could be said to be void, incapable in any event of effecting a transfer of title. That quality attaches to a patent only when the land which it purports to convey is not lawfully subject to disposition by the Land Department. In such a case the department is without jurisdiction over the subject matter. But the land being subject to disposition by the department, its jurisdiction over the subject matter is complete, and a patent to such land is not not only *prima facie* valid, but impervious to collateral attack, although it may be held to be voidable, in a proper proceeding, for having been erroneously issued.

As Mr. Justice Brown said, delivering the opinion of the court in *Noble* v. *Union River Logging Railroad*, 147 U. S., 165, 174:

> This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent.

In the leading case of *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646, this court, speaking through Mr. Justice Field, said:

> A patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment.
>
> * * * * *
>
> On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.
>
> According to the doctrine thus expressed and the cases cited in its support,—and there are none in conflict with it,—there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a

> patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief.

The principles governing the powers, functions and duties of the Land Department, and the effect of its decrees and of the patents issued thereon have been declared and applied by this court in a multitude of cases. They have been ably summarized by Circuit Judge Sanborn in *King* v. *M'Andrews*, 111 Fed. 860, 863, in language which, omitting the exhaustive citations, is as follows:

> The land department of the United States, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them.
>
> A patent of land within its jurisdiction, issued by the land department, is the judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of that judgment.
>
> When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack.

The test of the jurisdiction of this tribunal is the true answer to the question, had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the land department had jurisdiction of the case, and the patent which evidences its decision conveys the legal title, and is impervious to collateral attack. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it.

Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and the land for the disposition of which Congress has made no provision, is not intrusted to the disposition of the land department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law.

But land which the Department is vested with the power and charged with the duty to hear and decide the claims of applicants for and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong.

> The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions.
>
> The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it.
>
> The aggrieved party has a like remedy for the wrongful issue of a patent upon a misapprehension of the facts, which is induced by fraud or gross mistake.

In *Shepley* v. *Cowan*, 91 U. S., 330, 340, this court said:

> The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of preemption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions.

In *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 301, this court expressly held that a claimant under one of the general land laws can not call upon the courts

to determine and declare his alleged title in advance of the adjudication of his claim by the Land Department, upon the theory that by the admitted facts there is nothing which the department could do but declare him to be the owner, as a matter of law. The court said (p. 313):

> The protest by the defendants was duly filed within the time permitted by the regulations of the office, and the questions arising thereunder are, as stated in the bill, still pending before the General Land Office. Whether it was necessary at the time of making the selection for the selector to file in addition to his non-mineral affidavit an affidavit that the land was not occupied in fact, is a question of law for the Land Department to determine among the other questions to be decided by it. Its decision of any legal question would not, of course, be binding on the courts whenever such a question might properly arise in any future litigation. It is also for the Land Department to determine whether, if the land were not known to be mineral land at the time of the selection, the fact that mineral in paying quantities has been found since that time, will vitiate that selection.

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> Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts can not take jurisdiction and proceed to decide such question

> themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction can not be taken away from it by the courts.

In *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, the petitioner sought by mandamus to compel the Secretary of the Interior to recall and vacate a decision rejecting certain selections made under the Forest Lieu law, to reinstate the proceedings before the Land Department based thereon, and to issue patents for the land selected in conformity with the law as the petitioner asserted it to be. It appears from the statement of facts in the report that the questions decided by the Secretary adversely to the petitioner were pure questions of law. This court decided that the function of the Secretary thus sought to be controlled was judicial and not ministerial in its nature. The following quotations are from the opinion (pp. 323, 324):

> We have set out in the foregoing statement of facts, at very great length, a large portion of the contents of the petition and answer in this case. It has been done for the purpose of showing by the record itself the questions of law arising therefrom. Upon a perusal of the record it appears that those questions are not merely formal ones nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had

> full and complete jurisdiction over the matter arising under the act of June 4, 1897, and it thereby became the duty of the officers of that department to decide them. * * *
>
> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. * * *
>
> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. *Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was*, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.

Conceding however that a patent issued to an assignee of a desert land entry would be void, to the extent that it would not operate to convey the legal title and might be assailed collaterally, the patent would not be a total nullity. It would, at least, be a solemn act of Government which, as has been held by this court, the Executive could not recall, and which the judgment of a court alone could set aside—*United States* v. *Stone*, 2 Wall., 525, 535; *Beley* v.

Naphtaly, 169 U. S., 353, 364; and which "*prima facie passed* the title", Hughes v. United States, 4 Wall., 232, 236.

Its importance would go even beyond this, since by lapse of six years' time, this outstanding "void" instrument would operate to divest the United States of all title to the land.

In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S., 447, the government claimed that the patent sought to be set aside was void, because issued for lands which at the time of issue were reserved for public purposes, and that therefore the statute of limitations (Act of March 3, 1891, ch. 561, sec. 8, 26 Stat., 1099) had no application. This court, however, said, (p. 449):

> There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that "suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act," that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. Peter R. R. Co., 165 U. S., 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make

it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to "any patent heretofore issued," it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. *Leffingwell* v. *Warren*, 2 Black, 599.

In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren*, 2 Black, 599, 605; *Sharon* v. *Tucker*, 144 U. S., 533; *Davis* v. *Mills*, 194 U. S., 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S., 463, 476.

2. Jurisdiction existing to adjudicate the claim which the false testimony supported, such testimony was none the less "material" because the allowance would have been erroneous.

The assignment under consideration had already been filed in the land office, and, under the rules and decisions of the department, the assignee had a right

to proceed under it. The proof was taken accordingly with the certainty that, if sufficient in substance and properly authenticated, it would be received. The case may be viewed as analogous to a case pending in court which has progressed to an issue of fact upon a bill or declaration revealing on its face the want of a good cause of action, but in which the court has the power to render an effective though reversible judgment. Testimony relevant and material to this issue of fact, would be no less so because the issue had been joined in disregard of the erroneous theory upon which it was tendered. Upon this point the authorities are apparently unanimous.

The case of *Adams* v. *Way*, 32 Conn., 160, illuminates our contention. It was there held that, although the plaintiff's statement of his cause of action was so defective as to be subject to a general demurrer or a motion in arrest of judgment, testimony of facts tending to support the cause of action as stated was not objectionable as immaterial; and the court said:

> "By 'material' in this connection is not meant of legal sufficiency, but whether they constitute a part of the plaintiff's case as he presents it."

So, in *State* v. *Whittemore*, 50 N. H., 245, 248, it was held that "perjury might be committed on the trial though the complaint was bad upon demurrer or motion in arrest of judgment."

In *Stewart* v. *State*, 22 Ohio St., 477, the question was whether perjury could be committed in Ohio in

proceedings to take depositions for use in a divorce case pending in Indiana, in the absence of the facts of residence necessary to exist to maintain jurisdiction in the Indiana court. Held, that it could. The court said (p. 484):

> While the petition is pending, and the question of residence is undetermined, or the fact of residence has been found by the court, surely there is a case or matter pending in which the court is authorized by law to hear testimony and to administer oaths to witnesses. Whether the decree of the court, based upon an erroneous finding of the fact of residence, will be binding upon the parties, and estop them from denying the fact of residence, is entirely another question; it is enough here to know that the laws of Indiana authorize the institution of the proceeding before the fact of residence is established, and give the court power to hear testimony in the case.

In *State* v. *Rowell*, 72 Vt., 28, 15 Am. Cr. Rep., 567, defendant was prosecuted for perjury committed in another criminal trial against himself wherein the indictment had been found to be too bad to support the conviction. It was claimed that, because of this fatal defect, there was, in the former case, "no issue to which the testimony was material." But this claim was overruled. We quote from the opinion:

> The trial court had power to hear and determine the cause and this constituted jurisdiction of the subject matter. *Vaughan* v. *Congdon*, 56 Vt., 111; Perry v. Morse, 57 Vt., 509.

The case, therefore, is entirely different from one where the oath is administered by a person having no legal authority for so doing, as by a person acting merely in a private capacity, or who has authority to administer certain oaths but not the one in question, or by one who has authority seemingly colorable, but which is in fact unwarranted and merely void. In such cases the oath is not perjury, for it is altogether idle. 1 Russ. on Cr. (2 ed.) 520. The case is not different in principle from one where there is a mistrial by reason of error in the admission or rejection of evidence, or in instructions to the jury, or where judgment is arrested by reason of a defect in the declaration, in which cases it could not be seriously contended that false testimony did not constitute the alleged crime.

If the crime of perjury consisted wholly of the wrong done in procuring an unjust verdict, there would be a semblance of reason in claiming that when the verdict was set aside by reason of an insufficient indictment the proceeding was a nullity, and perjury had not been committed. But a wrong verdict, though it may be the result of perjury, is not its essence. All the authorities agree that a prosecution for the offense is not grounded upon the injury or inconvenience which an individual or the public may sustain, but upon the abuse and insult to public justice. (2 Chit. Crim. Law, 157; 7 Bac. Abr. 426.) Accordingly it is held that it is immaterial whether the false oath is credited by the triers of the fact or not, or whether the person

to whose prejudice it was taken is damaged by it or not. Bac. Abr., supra; 2 Bish. New Cr. Law, sec. 1028.

So it has been held that a witness is guilty of perjury who testifies falsely to a material fact, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testifies. *Chamberlain* v. *People*, 23 N. Y., 85; 80 Am. Dec. 255.

It is laid down in 2 Russ. on Cr., 6th ed. 318, that perjury may be committed on the trial of an indictment which is afterwards held bad upon a writ of error, and *R.* v. *Meek*, 9 C. & P. is cited as authority. There it was objected that the evidence of the defendant could not have been material, as the former indictment was held bad upon a writ of error for an insufficient assignment of perjury, but the objection was overruled, the court remarking that it would be rather too much to say, that whether a witness had committed perjury or not, could depend upon the validity in point of form of the indictment as to which he had testified. The ruling sustaining the State's demurrer to the respondent's plea was correct.

In *Chamberlain* v. *People*, 23 N. Y., 85, the plaintiff in error sought to reverse a conviction of perjury, based upon false testimony which he had given in divorce proceedings against his wife. The statute under which he was convicted was practically the same as Revised Statutes section 5392, providing in substance that every person who should wilfully and corruptly swear to "any material matter on any oath, affirmation, or declaration legally administered

in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof" should be deemed guilty of perjury. The false testimony had a direct logical tendency to sustain the action for the divorce but was clearly inadmissible and incompetent because of its character, and for this reason was claimed, in the criminal proceeding, to have been immaterial. This contention, however, was overruled. The court said, (p. 87):

> The testimony offered to be proven was given before an officer of the court in a proceeding in an action, and was a fact tending directly to establish the main issue submitted to the referee, and therefore material * * *
>
> (page 88) Although the testimony inquired after was clearly incompetent and inadmissible in the action in which it was given, still its admission did not render it immaterial. The referee erred in receiving it; but that error did not destroy its materiality. Were it false, perjury could be predicated upon it. It was held in Van Steenbergh v. Kortz (10 J. R. 167), that a party erroneously sworn in his own behalf might be guilty of perjury, especially where the proceedings remained unreversed; and the doctrine of that case was approved in Pratt v. Price (11 Wend., 128).

In *Wood* v. *People*, 59 N. Y., 117, 123, the court said:

> If a person swears falsely in respect to any fact relevant to the issue being tried, then we think he is guilty of perjury, although the case failed from defect of proof of another fact, and

> although the other fact alleged had no existence * * * The evidence would be relevant to the cause, and it does not lie with the perjurer to say that if he had sworn to the truth the case for other reasons would have failed.

That reversible irregularity in the proceedings in which the false testimony was given is no defense to the prosecution for the purjury is clearly held in *Smith* v. *State*, 31 Tex. Cr. App., 315, 20 S. W., 707, where the point of objection was that in the criminal case in which the false swearing was done the jury had not first been sworn, and in State v. Hall, 7 Blackf., 25, where it appeared that in the prior trial but six men were impaneled as jurors, whereas the law required twelve. Other cases of similar effect are:

State v. Wakefield, 73 Mo., 549, 554;

State v. Flagg, 27 Ind., 24, 25;

Cordway v. State, 25 Tex. App., 405; 8 S. W., 670;

State v. Brown, 68 N. H., 200; 38 Atl., 731;

State v. Peters, 107 N. C., 876;

State v. Levalley, 9 Mo., 824, 827;

Kelley v. State (Tex. Cr. App.) 103 S. W., 189;

2 Bishop Cr. L. (8th Ed.) sec. 1030.

> The true test would seem, in reason, to be, whether the evidence could have properly influenced the tribunal. Though by accepted rules of practice it ought to have been rejected, still, if admitted, it must be deemed to have wrought its legitimate results. The ruling of the judge was the law for the moment and the occasion when and upon which the witness

> gave the testimony; therefore, if it was pertinent and false, it should be adjudged perjury. 2 Bishop Cr. L. (7th Ed.) sec. 1036.

It is conceded, of course, as a well settled doctrine of the common law, that testimony wholly immaterial to the issue or matter presented for determination can not, however false, be made the basis of a prosecution for perjury. This rule, it must be said, is technical in the extreme if not actually unwise. (Stephen, General View of the Criminal Law of England, p. 279.) However this may be, it is clear that the doctrine should not be pushed so far as to class as immaterial and innocent, false and corrupt testimony tending logically and directly to sustain any claim presented to an officer or tribunal possessed of jurisdiction to decide concerning it, however limited may be the jurisdiction and however ill founded may be the claim when carefully examined in the full light of the law. The true rule here intends, by the term "material," that which is material to the claim set up for adjudication or allowance, whatever it may be. The test is not whether the testimony tends to prove a claim good in law, but whether it tends to prove any claim or matter in any sense justiciable by the tribunal or officer before whom it comes for decision. Of course, if the matter be wholly without the jurisdiction, it can not be decided at all, and therefore the testimony is said, in a loose way, to be "immaterial," the real objection being, however, not immateriality, but the total want of juristic quality in

the proceeding and hence the total impotence of the testimony to effect any juristic result.

The distinction, as to effect, between false testimony in a proceeding wholly void for lack of jurisdiction and false testimony in a proceeding where the judgment is erroneous and voidable, is well stated by Wharton in 2 Cr. L., (8th ed.) sec. 1272, as follows:

> A suit which is actually void and null for want of jurisdiction or other incurable defect is not one in which perjury can be committed. Thus it is not perjury to swear falsely in a discontinued or abated suit. But if the proceeding is merely voidable, even though there be such defects as require a reversal on error, false swearing in its conduct is perjury, if the false evidence could by any contingency be introduced as testimony.

II.

THE ASSIGNMENT OF THE ENTRY WAS LAWFUL.

1. The desert land laws.

The original desert land act entitled "An Act to provide for the sale of desert lands in certain States and Territories," approved March 3, 1877, ch. 107, (19 Stat. L., 377), is as follows:

> That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district

in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land, if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided*, that no person shall be permitted to enter more than one tract of land and not to

exceed six hundred and forty acres which shall be in compact form.

Section 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

Section 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

(Note: This act was preceded by another, of similar provisions, but applicable only to lands in Lassen County, California, Act of Mar. 3, 1875, ch. 160, 18 Stat. L., 497).

This act of 1877 was amended by section 2 of the act of March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes," ch. 561, 26 Stat. L., 1096; by addition to the earlier act of five new sections, designated as sections 4 to 8, inclusive. These, so far as may be material, are:

Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall ex-

hibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

Sec. 5. That no land shall be patented to any person under this act unless *he or his assignors* shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid: and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improve-

ments during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre; Provided, That proof be further required of the cultivation of one-eighth of the land.

Section 6 saves rights under the prior law, allows them to be perfected thereunder or under this law, and repeals all acts and parts of acts in conflict with this one.

Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the *applicant or his*

assigns; but no person or association of persons shall hold by *assignment or otherwise prior to the issue of patent,* more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act. *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and the moneys paid therefor, shall be forfeited to the United States.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

The following legislation has been enacted since the alleged perjury occurred, viz:

Act of March 26, 1908, ch. 103, 35 Stat. L., 48, "Providing for second desert land entries:"

That any person who prior to the passage of this act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled

> to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert land entry under this act shall furnish the description and date of his former entry; Provided, That the provisions of this act shall not apply to any person whose former entry was *assigned* in whole or in part or cancelled for fraud, or who relinquished the former entry for a valuable consideration.

The Act of March 28, 1908, ch. 112, 35 Stat. L., 52, "Limiting and restricting the right of entry and assignment under the desert land law, and authorizing an extension of time within which to make final proof," provides:

> Sec. 2. That from and after the date of the passage of this Act *no assignment of an entry made under said Acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said* Acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

2. Construction by the Land Department and the Courts.

Prior to the amendment of 1891, the attitude of the Land Department toward assignments before final proof of entries made under the original act was vacillating.

The original instructions of March 12, 1877, provided that the declarant "or his assignees" might

fulfill the conditions and obtain the patent; and this practice was followed until April 15, 1890, when Secretary Schurz reversed it in Downey's Case (2 Copp's L. O., 26), saying:

> I think there can be no doubt that the claims were not assignable. The law by which the entries were allowed to be made treats them as the claims of the party making the entry. If proof is made showing a compliance with law, "a patent for the same shall be issued to him."

His ruling, was, in turn, modified in 1884, by Secretary Teller, to the extent of permitting final proof on entries assigned prior to April 15, 1880, but the patent was directed to issue in the name of the original entryman. *Dole's Case*, 3 L. D., 214. This decision contains a resume of the previous rulings. Secretary Teller there said (p. 215):

> Although I find nothing in the act to warrant so broad a construction of its provisions—especially as it expressly provides that the declarant shall make oath that he intends to reclaim the land and that upon proof of reclamation patent shall issue to him, and as the right of assignment is not directly authorized—yet these instructions had the force of law, and parties had the right to assume that this was the legal construction of the act, and that assignees of such entries would be protected in their purchases and have the rights of entrymen. I think it immaterial that the construction was erro-

> neous and unwarranted, so long as it was the official announcement of the law by the Land Department.

As to all assignments made subsequently to the ruling of Mr. Schurz, April 15, 1880, the Department maintained steadily an adverse attitude until the act was amended. See *Gasquet* v. *Butler's Heirs*, 27 L. D., 721, 722; *Arnold* v. *Christy* (Sup. Ct. of Arizona, 1893), 33 Pac., 619.

Coming now to the amendments of March 3, 1891, we find the Land Department recognizing, almost immediately, the assignability of desert entries, in the following paragraph of instructions concerning this act, issued to registers and receivers, under date of April 27, 1891, by the Commissioner of the General Land Office with the approval of the Secretary of the Interior:

> Assignments are recognized, but the amount of land that may be held by assignment or otherwise, prior to issue of patent is restricted to 320 acres by the seventh section, which section it is provided, however, shall not apply to entries made prior to the act. Assignees must properly prove their assignments by filing in the local office an affidavit and certified copy of the instrument under which they claim, and must make affidavit of the amount of land held.

The same day the Secretary ruled, however, that the assignee, as well as the original entryman, must (under section 8 of the act) be a resident of the state

or territory wherein the land was situate, and must show this on final proof.

Instructions, 14 L. D., 565.

By instructions to registers and receivers, dated January 26, 1894, approved by Secretary Hoke Smith, attention was specially directed to the requirement that the assignee must possess the qualifications of the original applicant in the matter of citizenship and residence. 18 L. D., 31.

January 22, 1895, Secretary Smith, in reversing this requirement as to residence, and in holding that the word "entry" in section 8 refers to the original filing, and not the final proof, said:

> Congress contemplated an assignment of these desert land entries. The object of making this class of entries an exception to the unvarying rule—except as to coal entries—can be readily understood. It is a matter of common knowledge that the effecting of a thorough or sufficient reclamation of desert lands in many instances involves the erection of permanent dams or reservoirs for the purpose of storing the water in the season when at flood, and the construction of canals for carrying the water many miles in length. From these canals lateral ditches must be run to the particular tracts to be irrigated. All this means permanent structures on exact grades to prevent washing; headgates wherever the lateral ditches leave the main canal, constructed accurately to avoid waste, and so that the quantity of water required may be exactly measured. It is needless to say, perhaps, that all this re-

quires a greater amount of capital ofttimes than can be furnished by the residents in the desert country. To induce those of our people who have the money to further these great enterprises, Congress wisely provided that these desert entries might be transferred under certain limitations and restrictions so that the assignees who have invested capital in the construction of these waterways might be assured of some compensation for their outlay. If the construction heretofore placed on this act is to prevail, that the assigns must also be resident citizens of the State or Territory where the land is located, it might defeat the object Congress had in view.

Re Kimball, 20 L. D., 67, 70.

In *Gasquet* v. *Butler's Heirs* (Dec. 29, 1898), 27 L. D., 721, it was held that an entry made under the old law and assigned after the act of 1891, could be proved up under the latter. We quote from page 722:

> The matter of the said assignment, however, should perhaps receive brief consideration herein. Desert land entries controlled by the provisions of the Act of 1877, supra, have been uniformly held to be non-assignable ever since the decision of April 15, 1880, in the Downey Case (7 C. L. O., 26), and to be vitiated and rendered subject to cancellation by attempted assignment (David B. Dole, 3 L. D., 214; Henry W. Fuss, 5 L. D., 167; Circular Instructions of June 27, 1887, ibid., 708; and Haggin v. Doherty, 14 L. D., 123). The Act of March 3, 1891, supra, entitled "An Act to repeal timber culture laws, and for other pur-

poses," added five sections, numbered from four to eight inclusive, to the desert land act of 1877. By section seven of these amendatory sections authority is expressly given to issue patent "to the applicant or his assigns," but it is further declared therein that "this section shall not apply to entries made or initiated prior to the approval of this act." This is, however, not the only provision of the amendatory act authorizing or recognizing assignments of desert land entries, because section five of these added sections also plainly contemplates that assignments may be made of desert land entries during the period allowed for the reclamation and improvement of the lands embraced therein.

Without section seven the preceding amendatory sections of the act of 1891 would undoubtedly be held to contain sufficient authority for assignments thereafter, notwithstanding the entry was made or initiated previously, provided it was perfected under that act instead of the act of 1877 alone. Would it not be a violent construction to hold that after recognizing, and in effect approving such assignments in sections five and six, Congress intended in section seven to forbid them except in cases where the entry was made subsequent to March 3, 1891? Section seven contains several provisions in addition to that relative to assignments, and it does not follow that in declaring, generally, that these shall not apply to entries already made or initiated, that it was the intention of Congress to infringe upon or limit in any way the provisions of the

preceding sections applicable to such entries. The prohibitive words are confined, in terms, to the provisions of that section, and, it is believed, do not reach or control, by necessary implication, the provisions of the preceding sections relative to assignments.

Other departmental decisions evidencing the settled construction in favor of assignment, may be referred to briefly.

A corporation organized under the laws of the State is in contemplation of law a citizen of the United States, and, as such, can take and hold by assignment a desert entry.

Nevada Southern Ry. Co., decided December 28, 1895, 22 L. D., 1.

While a desert land entry made in accordance with the law, may be fully assigned, the right to make such an entry is not assignable.

T. C. Power & Bro., 33 L. D., 152, 154, decided June 30, 1904.

In the case of absolute assignments of such entries, the assignee assumes the position of an original entryman, so far as his qualification to take is concerned, and he being the person then charged with the submission of satisfactory proof of compliance with the law, is before the land department in his own right and all future transactions respecting the entry are conducted directly with him.

Herbert C. Oakley, 34 L. D., 383, 396, decided January 15, 1906.

The assignee of a desert land entryman, who for all purposes is the successor of the entryman, must be held to be entitled to the

same rights and privileges with respect to the entry that the entryman might have been entitled to in the absence of an assignment.

Campbell v. Glover et al., 35 L. D., 474, 477, decided March 20, 1907.

See also Ida Lundquist, 37 L. D., 149–150, decided September 8, 1908; Thomas E. Jeremy, 25 L. D., 375, 376; Ellingston v. Aitken, 30 L. D., 71, 73.

3. The act as amended in 1891, though permitting assignments after entry, does not countenance the making of entries with the intention to assign, or with any other intention than that of reclaiming the land.

This important distinction, whatever its bearing upon the argument which follows concerning assignability *after* entry, can not be too strongly insisted upon, in order both to prevent a misunderstanding of the government's position concerning it, and to insure for the statutes in question a construction which, while rendering them liberal toward their intended beneficiaries and effective of the purposes which they were designed to accomplish, shall save them from becoming the means whereby unscrupulous speculators may engross large portions of the public domain and practice extortion upon deserving persons who would acquire land by honest performance of the statutory conditions.

The law of 1877 (sec. 1) provides that upon making his entry the entryman shall declare on oath that "*he intends to reclaim*" *the land* "*by conducting water upon it.*" This requirement has never been relaxed. The amendatory acts do not alter it in the slightest degree.

And there is ample reason why this should not be done. The purpose of the statute, originally and now, was not and is not limited to the mere reclamation of desert lands. The idea of reclamation went hand in hand with the idea of settling up the regions affected by worthy and industrious citizens. The proceedings attending the passage of the act of 1877 in the House of Representatives show this.

The following is from the report of the Committee on Public Lands recommending to the Senate the passage of the bill as it came from the House:

> It has been suggested that these lands be sold in large quantities in order to induce private capital to undertake the work of their reclamation. Your committee fear that any system of sale whereby the title would pass before irrigation would encourage speculation without inducing settlement. The bill provides for the sale of a section of land to any person who will first irrigate the same, at the usual price of $1.25 an acre. A more liberal policy has been suggested of granting lands, after irrigation, without any money consideration. But the committee believe that when these lands are irrigated they will be of sufficient value to enable the purchaser to pay the Government price paid for other public lands. Besides, the quantity allowed will be an additional inducement to settlers to undertake the work of irrigation. At all events, it will be time enough to make donations of these lands when it is ascertained that settlers are unwilling to purchase them. It is believed that

> by far the larger portion of the lands bordering on the streams, where sufficient moisture exists for cultivation and where irrigation is cheap and easy, have been appropriated; but the provisions of this bill will enable settlers by combined effort to construct more extensive works and reclaim a class of lands that are now absolutely worthless. The committee recommend the bill with more confidence than they would be willing to express if its principles were entirely new.

For the full report and the lengthy debate which followed, see Cong. Rec., 44th Cong., 2d Session, Vol. V, Part 3, pp. 1964 et seq., 2102, 2156, 2225.

It is manifest that neither the purpose of reclamation nor the attendant purpose of settlement would be promoted by permitting lands to be filed on by mere speculators who might hold them for three years, (under the original act), or one year, (under the amended act), without the doing of a single thing toward the reclamation. Such speculative filings, whereby men who are often little better than parasites acquire a hold upon valuable property for the sole purpose of exacting a price from others really desirous of fulfilling the statutory condition, have been so disgracefully numerous under other laws, notably those relating to acquisitions of rights of way, reservoir sites, and water appropriations and even under the general mining laws, as strongly to suggest that any statutory construction which permits of this form of abuse should be avoided if possible. In the lengthy brief which has been tendered to the court in

this case by counsel representing Chaplin and others, convicted in California for conspiracy to bring about speculative desert land entries in fraud of the statute, an elaborate argument is made to show that since under the act of 1891 entries *already made* are assignable, an entry may be *initiated* thereunder with speculative intent. Counsel reason that if the making of the entry brings with it the right of assignment, the entry may be made with intent and for the purpose of exercising that right. This is a palpable *non sequitur*. The statute in so many words requires that the entryman when filing his initial declaration, shall intend himself to accomplish the reclamation. This is one of the most important features which the statute contains. It is the means whereby the law seeks to select the persons who are most likely to realize its objects, and excludes the speculative go-between. If the statute read as these counsel would construe it, it would be a standing invitation to speculators. The conferring of the right of assignment upon one who has already passed the test by making his entry in good faith with the requisite intention evinces no legislative purpose to encourage speculation, but, rather the extension of a privilege to one who has shown himself worthy of it by proving that he is not a speculator—a privilege which he is likely to prefer not to exercise, but the need of which may come to him by stress of circumstances.

The Land Department has consistently held that entries with speculative intent are not permitted by the statute and this construction should be upheld;

4 L. D., 445; 7 L. D., 337; Id., 378; Circular of June 27, 1887, Reg. 4, 5 L. D., 708, 709. The court decisions are in harmony with this construction.

In *United States* v. *Mackintosh*, 85 Fed., 333, 338, the Circuit Court of Appeals for the Eighth Circuit held:

> There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, *when perfected*, for the benefit of even a corporation, *when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation*. In such case, if the patent be issued to her, she could transfer to whom she pleased. As said by Mr. Justice Brewer, in *U. S.* v. *Budd*, 144 U. S., 163, 12 Sup. Ct., 577:
>
> "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation * * * If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied."

In *Salina Stock Co.* v. *United States*, 85 Fed., 339, decided by the same court on the same day, the acquisition of lands by individuals, nominally for themselves, in reality for a corporation, was denounced as a defiance of the statute and a fraud upon the United States. The case showed a clear instance of "dummy" entries, and the correctness of the decision can not be questioned.

In *Arnold* v. *Christy* (Arizona, 1893), 33 Pac., 619, the court upheld as valid an agreement by Christy, the entryman, with Arnold, providing in terms, that Christy *would at his own expense procure patent* to the land, *and then convey to Arnold* for fourteen thousand dollars, Arnold paying Christy a part of that price down, to be returned to him should Christy fail to obtain final papers and make the deed. The court distinguished between this kind of an agreement and an assignment of the entry itself, saying:

> We know of no ruling of the land department holding that one who has entered desert lands in good faith may not make an agreement to convey the land after title shall vest in him. On the contrary, the land department has affirmatively recognized such agreement as valid, and as not affecting the rights of the entryman to obtain title. In the case of Lanktree v. Vibrans, decided by Commissioner Sparks, and reported in 13 Copp, Landowner, 220, of January 1, 1887, it was held that such an agreement was not an assignment of the entry, and not prohibited by any ruling of the department. We are unable to see wherein the contract in question, by its terms, contemplated any violation of any of the provisions of the desert land laws as to the requirement necessary to obtain title, or restricting the quantity of land which may be acquired by any one person under it, nor any violation of any ruling of the land department which has the effect of law.

4. A fair construction of the amended act leaves little doubt that the right to assign after entry and before final proof is recognized.

The particular clauses of the act as amended in 1891, which expressly refer to assignments, are these:

> Sec. 5. That no land shall be patented to any person under this act unless he, *or his assignors* shall have expended in the necessary irrigation . . . at least three dollars per acre, etc.
>
> Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof . . . and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor *to the applicant, or his assigns;* but no person, or association of persons shall hold, *by assignment or otherwise*, prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands.

Without question the words "assignors," "assigns" and "assignment" relate to the same thing and are used in a single sense. They have been interpreted by the trial court as referring to "transfers" of that full equitable estate, which can only be acquired by complete performance of all the requirements of the act, including final proof, and final payment of the purchase money. The only other interpretation relates to the right, short of equitable ownership, which an entryman acquires by virtue of

partial compliance with the act—that is, the right to pursue the proceeding to final proof and patent, retaining meanwhile the possession of the land, and the benefit of all that has previously been done toward performance of the statutory requirements. There are obvious reasons why the latter should be adopted as the correct interpretation.

A. In the first place the terms "assignor" and "assignment," are technically appropriate when referred to the entryman's *right*, as it exists prior to final proof and payment, but decidedly less appropriate when applied to the *equitable ownership* which he acquires by fulfilling every condition.

The term as commonly, if not almost invariably, used, seems to imply a transfer of some right or interest in a subject-matter in which a third person, not necessarily a party to the transaction, is also interested. Thus it is proper to speak of an assignment by A to B of a cause of action against C or, a general assignment by A to B as a trustee for the benefit of A's creditor, or of an assignment by A to B of a term of years held by the former by demise of C, the owner of the fee. When, however, we have in mind an out and out transfer of the legal or equitable fee in land, it is technically correct to speak of the transaction as a conveyance, and incorrect, or certainly not usual, to denominate it an "assignment."

In *Interstate Land Company* v. *Maxwell Land Grant Co.*, 41 Fed., 275, 279 (affirmed 139 U. S.,

569), Judge Brewer, in construing the verb "assign" in a Mexican empresario contract, said:

> Now, the word "assign" may mean "convey", although it is not the ordinary word used in respect to land transfers.

The word was there held to imply not a conveyance but a setting apart of the land.

> The words "transfer" and "assign" are not the usual operative words of a conveyance of real estate. Sanders v. Ransom, 20 So., 530, 531.
>
> "Convey" is apt to pass realty, and "assign" is used in the disposition of personalty. Story v. Palmer et al., 18 Atl., 363, 365.

In *Cowles & Co.* v. *Rickert*, 1 Iowa, 582, 585, the court says:

> The common law definition of an assignment is, "the transferring and setting over to another, of some right, title or interest in things, in which a third person, not a party to the assignment, has a concern and interest". 1 Bac. Abr., 329.
>
> In 1 Devlin, Deeds, sec. 20., it is said:
>
> In common language this term signifies the transfer of all kinds of property, real, personal and mixed, and whether the same be in possession or in action—as a general assignment—In a more technical sense, however, it is usually applied to the transfer of a term of years; but it is more particularly used to signify a transfer of some particular estate or interest in land.

In Franklin v. Kelley 2 Neb., 79, 88, the Supreme Court of Nebraska construing the provision of the Preemption Act that "All assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void," observed:

> There is a manifest inaptness in this language to describe a conveyance with covenants for title and with warranty, purporting to pass the fee-simple of lands and tenements. I know no other place, in law-books or law-writings, where such a conveyance is spoken of as an assignment or a transfer. Those words may have the large meaning here sought to be placed upon them; but it is very unusual. These terms are used more usually—indeed always, so far as I remember—when applied technically to describe a transfer of an estate for years, or an equitable interest, or a chattel; and this seems to be the use of it here when taken in connection with the word "right,"—a word never employed when speaking of a fee in lands, or even an estate less than a fee in lands.

B. The Court's interpretation renders the words "assigns" and "assignors" practically useless. The equitable fee acquired by full compliance with the law imports complete beneficial ownership, with unrestricted *jus disponendi*. When the patent is earned, it is practically issued. The land ceases to be a part of the public domain, and is subject to be alienated

and taxed as other lands are. So the court has held in many cases.

> Carroll v. Safford, 3 How., 461;
> Witherspoon v. Duncan, 4 Wall., 210;
> Myers v. Croft, 13 Wall., 291;
> Quinby v. Conlan, 104 U. S., 420, 427;
> Stark v. Starrs, 6 Wall., 402, 419;
> Wirth v. Branson, 98 U. S., 118;
> Deffeback v. Hawke, 115 U. S., 392, 405;
> Benson Min. & Smelting Co. v. Alta Co., 145 U. S., 428.

In *Witherspoon* v. *Duncan*, *supra*, the Court, affirming the doctrine as fully explained in Carroll v. Safford, *supra*, held that lands, when finally entered, are subject to state taxation, although through delay of the patent, the barren legal title is still in the United States, saying (p. 218):

> In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property . . . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who holds the equitable title.

This was held of an entry under an act giving the right to enter lands to settlers who were ousted of

possession of others through a treaty with the Cherokees.

In *Carroll* v. *Safford, supra,* the court said of pre-empted land (p. 460):

> When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate-holder and the patentee.
>
> It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty. Now, why can not such property be taxed by its proper denomination as real estate?

In *Quinby* v. *Conlan, supra,* this court through Mr. Justice Field, said (p. 422):

> The general preemption law declares that all transfers and assignments of rights thus obtained prior to the issuing of the patent shall be null and void. This court held—looking at the purpose of the prohibition—that it did not

> forbid the sale of the land after the entry was effected, that is, after the right to a patent had become vested, but did apply to all prior transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated. Myers v. Croft, 13 Wall., 291.

In *Stark* v. *Starrs, supra,* the Court said of land finally entered under the "Oregon Donation Act" (p. 418):

> The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued.

Section 2324 of the Revised Statutes provides, among other things, respecting mining claims:

> On each claim located after the tenth day of May, eighteen hundred and seventy-two, *and until a patent has issued therefor,* not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, ... and upon failure to comply with these conditions, the claim or mine . . . shall be open to relocation, etc.

In the Benson Mining Company's case, *supra,* it was held that notwithstanding the words italicized, when the price of a mining claim has been paid to the government, the equitable rights of the purchaser

are complete, there is no obligation on his part to do further annual work in order to obtain a patent, and an attempted relocation by another is void. This Court said, (p. 432):

> It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership.

nd p. 434:

> There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him.

See, also, *Lessee of French* v. *Spencer*, 21 How., 228, and other cases cited and commented upon in the Benson Mining Company case.

In *United States* v. *Detroit Timber Company*, 200 U. S., 321, this Court said (p. 337):

> The receipt is an acknowledgment by the government that it has received full pay for the land, that it holds the legal title in trust for the entryman and will in due course issue to him a patent. He is the equitable owner of the land. It becomes subject to state taxation, and under the control of the state laws in respect to conveyances, inheritances, etc.,

citing many previous cases.

The trial court did not ignore this principle for the opinion says (R. 14):

> Where an applicant for public lands of any sort has done all that the law requires to entitle him to a patent, he is justly regarded as its equitable owner and may, at any time thereafter, transfer his equitable estate, although the legal title be in the Government (Myers v. Croft, 13 Wall., 291; Deffeback v. Hawke, 115 U. S., 392, 405; U. S. v. Freyburg, 32 Fed., 195; Smith v. Ewing, 23 Fed., 741, 744). This qualified power of alienation has never, so far as I know, been denied by any court, and the sections above quoted do nothing more than import its recognition.

C. Again, the trial court's interpretation of the words "assigns," "assignors" and "assignment" involves an unreasonable restriction upon the right to dispose of the equitable fee. Section 7 provides that:

> No person shall hold by assignment or otherwise, *prior to the issue of patent* more than

three hundred and twenty acres of desert lands.

Reading "conveyance" for "assignment," and taking the words "prior to the issue of patent" literally, as the trial court has done, is to incorporate into the act a partial but very material, restraint upon the right to alienate the equitable fee. Why should A, who, having performed every condition and paid every dollar, has gained the final certificate, and, under the doctrine of the authorities we have just considered, is, in the eye of equity, the patentee, be prohibited from selling to his next neighbor B—the very person, perhaps, who would be most likely to desire the land—simply because B is the owner of similar lands mediately or immediately under a like entry? And why should B, under such circumstances, be forbidden to make the purchase? Why should the mere delay in the issuance of patent, a delay beyond the entryman's control and which may be seriously protracted, be ordained to produce these hardships?

These questions were asked and answered in cases which have been cited above. The words "prior to the issue of patent" mean prior to the time when the right to a patent becomes vested and fixed.

So in *Myers* v. *Croft*, 13 Wall., 291, it was held that preempted lands when entered might be freely conveyed, despite the declaration in the act that "all assignments and transfers of the right hereby se-

cured, *prior to the issuing of the patent* shall be null and void". The court said (p. 296):

> The inquiry is, what did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the preemption rights? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and independently of the legislation of Congress assignable. The object of Congress was attained when the preemptor went, with clean hands to the land office and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new States, admitted since 1841, have been taken up under the preemption laws, and the right to sell them freely exercised after the claim was

> proved up, the land paid for, and the certificate of entry received. *In view of these facts we cannot suppose, in the absence of an expres declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the government should choose to issue the patent.*

And in the Benson Mining Company's case, *supra*, where the statutory language construed would, if taken literally, have rendered the mining land entered subject to relocation, the court adopted the view of the Secretary of the Interior in the case of *American Hill Quartz mine* (Seckel's Min. Law & Dec., 377 & 385; Copp's U. S. Mineral Lands, 254), that "the full equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued"; and that the delay in issuing a patent being a matter attributable to the administration of the Land Department, the words "until a patent has issued" should not be taken literally,

D. Under this legislation the government offers, to the actual intending citizen, a maximum of three hundred and twenty acres of desert land, devoid of timber and minerals, and incapable, in its natural state, of producing any agricultural crop. To this offer, however, are attached onerous conditions. The person who accepts shall pay down in advance a sum equal to twenty-five cents for each acre entered. He must prepare and exhibit a plan of irrigation "sufficient to

thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops." Thereafter, during each successive year, for three years, he must both make and prove the *bona fide* expenditure of one dollar per acre in "necessary irrigation and cultivation" of the land "by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same." In the end, also, and before he is entitled to a patent, he must accomplish and prove actual cultivation of one-eighth of the tract, and pay an additional dollar for each acre by way of final purchase. And time is of the essence of the contract; for although three years are allowed for the work of reclamation, and a fourth within which to submit the final proof and make the final payment, it is provided (sec. 5) that if the annual improvements are not made and the proofs filed each year "*the lands shall revert to the United States*, and the twenty-five cents advanced payment *shall be forfeited* to the United States, and *the entry shall be cancelled.*"

The Interior Department construes the statute as requiring the acquisition of water-rights, and the construction of a system of ditches, adequate for the irrigation of all of the irrigable land in the tract selected, and proof of this and of the actual irrigation of all such irrigable land, before a final entry may be permitted. (See Regulations approved Nov. 20, 1908.) It is plain to any one at all familiar with conditions in the Arid West, that the expense of meeting these requirements may, and often will, be vastly in

excess of the outlay of three dollars per acre expressly mentioned in the act.

The work involved is not the work of a day; and the man who undertakes it with the best of prospects, may, by failing health or other change of condition, find himself unable to complete the task. Or he may die when the thing stands all but accomplished. Denial of the right of the entryman to assign to another qualified person or the right of his heirs to succeed by descent to his status before the Land Department, would work a great injustice without accomplishing the slightest good.

E. The true rule is that valuable property rights conferred by and earned from the government are accompanied by the right of assignment, unless there be some statutory prohibition, or evident policy, to the contrary. The law discourages restraint on alienation.

a— In Beley v. Naphtaly, 169 U. S., 353, 363, the Court, in upholding the validity of an assignment of a right to purchase lands under the act of July 23, 1866, ch. 219, "to quiet land titles in California," said:

> In Threadgill v. Pintard, 12 How., 24, the court recognized the right of an individual in possession of land and who was entitled to a preemption right therein to convey such right to another.
>
> In Webster v. Luther, 163 U. S., 331, it was held that persons entitled under the Revised Statutes, section 2304, to enter a homestead, who may have theretofore entered under the homestead laws a quantity of land less than 160

acres, and who had the right under section 2306 to make an additional entry for the deficiency, could transfer such right by a proper conveyance.

In the above cases the general rule of law which discourages all restraints upon alienation was recognized, and the assignment of a right before entry was held valid, one of the reasons for such holding being that there was no restriction against such assignment contained in the act creating the right. Nor is any such restriction to be found in the act of 1866.

See also *Myers* v. *Croft*, 13 Wall., 291, 296.

The "Act to Encourage the Growth of Timber on the Western Prairies," as amended June 14, 1878 (20 Stat., 113), required the entryman to state under oath in his initial application that the entry was made for the cultivation of timber for the exclusive use and benefit of the applicant, and that the application was in good faith, not for speculation, nor directly or indirectly for the use or benefit of any other person or persons whomsoever; and that it was the intention of the affiant to hold and cultivate the land and to comply with the provisions of the act. Eight years must elapse during which trees must be planted and cultivated; and if at the end of that period, the person making the entry, or, in the event of his death, his heir or legal representative, proved by two witnesses that the terms of the act had been complied with, a patent was to issue.

In *Adams* v. *Church*, 193 U. S., 510, this court upheld a contract of an entryman, made after initial but

before final entry under that statute, to convey an interest in the land to another after title from the government should be acquired. The court found no objection either to an outright disposition of his holding, or to an agreement requiring the entryman to prove up and convey afterwards. The opinion points out the clear distinction between the policy evidenced by the Homestead Act (*Anderson* v. *Carkins*, 135 U. S., 483), which aims to create homes, grants lands for that purpose, and positively forbids alienation prior to final proof, and the timber culture act, the main purpose of which was to supply trees to "the prairies theretofore barren of timber"; we quote the following:

> There is no requirement in the latter act that the entryman shall make oath that he has not alienated any interest in the land. The policy of the government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the Timber Culture Act if it was intended to extend the principle to that statute. . . . .
>
> If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and

forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. Myers *v.* Croft, 13 Wall., 291.

To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.

The Timber and Stone Act (20 Stat., 89), requires in the initial sworn application a statement that the applicant does not apply to purchase the land on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title when acquired shall inure, in whole or in part, to the benefit of any person except himself.

No similar assurance is required at the final proof, which may be made sixty days later.

In *Williamson* v. *United States*, 207 U. S., 425, 458, it was held that the placing of this requirement at the beginning, and its omission at the end, of the entry proceedings, was clear evidence that Congress had no intention of forbidding the entryman to contract *ad interim* for the conveyance of the land after title acquired. *Biggs* v. *United States*, 211 U. S., 507, 519.

See, also, *Phillips* v. *Carter*, 135 Cal., 604; *Rose v. Lumber Co.*, 73 Id., 385.

b. There is no express prohibition in the law under consideration. There is restriction in confining the benefits, as all the general land laws do, to citizens, actual or prospective. And there is restriction in limiting the quantity of land which may be acquired under the law. Only one tract may be entered by any one person, (sec. 1), and no person may "hold, by assignment or otherwise prior to the issue of patent" (i. e., prior to final proof) more than three hundred and twenty acres (sec. 7). The statute also exacts of the applicant, at the very beginning, an assurance on oath that he himself intends to accomplish the reclamation (sec. 1).

This exaction (quite similar to the requirements of the Timber Culture Law, considered in Adams v. Church, *supra*) forbids one person to file as a speculator or as the secret agent of another, and thereby operates to select for the work of reclamation those who are most likely to accomplish it, while also serving to prevent the holding of land for speculative or dishonest purposes. But all these things are consistent with a transfer by one qualified person, who has made a preliminary entry in good faith, to another qualified person, who receives it with an honest intention to complete the reclamation of the land. This robs no citizen of his equal opportunity, but subserves the main object of reclaiming desert lands.

In *Phillips* v. *Carter*, 135 Cal., 604, where it was held that the right of one who, under the original act had

fully reclaimed the land, was "assignable," and upon his death passed under a devise to his widow, who in turn was authorized to "assign" to another, the court said, (p. 606):

> There is nothing in the Desert Land Act of 1877, nor in the act of March 3, 1891, amendatory thereof, which either in terms or by express implication prohibits assignments; and while it is true that in construing the acts of the government, and of the grants depending thereon, the rule of construction is that most favorable to the grantor, yet the highest tribunal of the country, and the court of last resort for the construction of such acts, has uniformly held that this rule does not impose such a limitation upon ownership, unless by express provision, or by necessary implication, the law must be so read.

5. *The construction of the amended act by the Land Department should be adopted.*

From 1891 until the present time the Land Department has construed the amended act as permitting assignments. Its rules and practice directed the assignee to file his assignment in the land office, and carry on the proceeding thenceforth in his own name; and, accordingly, large acreages, now valuable by dint of heavy expenditures and much labor, have been patented directly to assignees, upon records revealing the assignments upon their face.

If the considerations which have heretofore been advanced go to the extent of raising a reasonable doubt concerning the meaning of the amended law,

that construction which has been so long and continuously adopted and acted upon by the Department should be accepted here. Such is the well settled doctrine of this court.

In *United States* v. *Moore*, 95 U. S., 760, 763, this court said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. Edwards v. Darby, 12 Wheat., 210; United States v. The State Bank of Nor. Car., 6 Pet., 29; United States v. MacDaniel, 7 Id., 1.

In *Shell* v. *Fauche*, 138 U. S., 562, 572, it was declared through Mr. Justice Brewer:

> In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.

To the same point are:

> *Brown* v. *United States*, 113 U. S., 568, 571; *United States* v. *Johnston*, 124 U. S., 236, 253; *Railroad Co.* v. *Whitney*, 132 U. S., 357, 366; *Midway Co.* v. *Eaton*, 183 U. S., 602, 609; *McMichael* v. *Murphy*, 197 U. S., 304, 312; *United States* v. *Hermanos y Compania*, 209 U. S., 337, 339.

6. Construction by Congress.

The bill which, when enacted, became the act of March 3, 1891, was reported to the House by Mr.

Payson, of Illinois, who had it in charge. The feature now under consideration was explained as follows:

> Mr. Stone, of Missouri. I desire to ask the gentleman from Illinois what limitation, if any, is fixed by this conference bill on the right to assign desert-land entries.
>
> Mr. Payson. The provision in the bill is that there shall not be any assignment whatever, so that any one person shall acquire in any way more than 320 acres.
>
> Mr. Holman. There is provision for assignment, but not to an amount more than 320 acres. (22 Cong. Rec., Pt. 4, p. 3614.)

Upon the propriety of considering these remarks, in determining the meaning of the act, see *Jennison* v. *Kirk*, 98 U. S., 453, 459, 460; *Blake* v. *Nat. Banks*, 90 U. S., 307, 317; *Houghton* v. *Payne*, 194 U. S., 88, 101, in Justice Harlan's dissenting opinion; *Binns* v. *United States*, 194 U. S., 486.

That Congress was cognizant of and approved the departmental construction is shown by the act of March 26, 1908, (35 Stat., 48), providing for second desert land entries, which contains the following proviso:

> That the provisions of this act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration,

and is more clearly shown by the act of March 28, 1908 (35 Stat., 52), by which it was declared in section two thereof:

> That from and after the date of the passage of this Act no assignment of an entry made under said Acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said Acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

It is proper to consider this legislation, in *pari materia* with the earlier acts concerning desert land entries.

United States v. *Freeman*, 3 How., 526, 564.

It is respectfully submitted that the judgment of the court below should be reversed.

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April, 1911.

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